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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-727

ALFONSO J. CERVANTES,
Petitioner,

vs.

TIME, INC., and DENNY WALSH,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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To the United States Court of Appeals for the Eighth Circuit

The petitioner Alfonso J. Cervantes respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in this proceeding on July 20, 1972.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 464 F.2d 986 and appears in the Appendix, *infra*, p. A-1. The

memorandum opinion of the District Court for the Eastern District of Missouri is reported at 330 F.Supp. 936 and also appears in the Appendix, *infra*, p. A-16.

JURISDICTION

The judgment of the Court of Appeals was entered on July 20, 1972. A timely petition for rehearing en banc was denied on August 17, 1972, and this petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether a newsman-defendant in a civil libel suit has a First Amendment privilege to withhold the identity of claimed sources of key information; and, if so, does the privilege extend to the identity of employees in the United States Department of Justice who are said by the newsman to have unlawfully "leaked" the key information from governmental files not available to the public.

2. Whether a publisher who proclaims that his publication is a report of his year-long investigation of the facts should, for purposes of malice, be held to know what a reasonable investigation would have disclosed.

UNITED STATES CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT I: Congress shall make no law . . . abridging the freedom of speech, or of the press.

STATEMENT OF THE CASE

Petitioner, the elected Mayor of the City of St. Louis, Missouri, brought this suit for defamation in the District Court pursuant to the diversity provisions of 28 U.S.C. § 1332.

The suit is based both on the feature article of the May 29, 1970, edition of Life magazine and on the pre-publication press release dispatched by Life to the news and electronic media to herald its coming.[1] Respondent Time, Inc. owns and publishes Life magazine and respondent Denny Walsh authored the feature article.

The article is titled "Investigative Report: St. Louis—The Mayor, The Mob and The Lawyer". Its dominant theme (and that of the press release) is the charge that petitioner "has business and personal ties with the gangsters that operate in his city". Petitioner contended that respondents maliciously complemented this false charge with four more defamations, and then endowed the lot with undeserved believability by falsely trumpeting that they "spent a year investigating" before publishing their "report" of "A New Life Investigation".

Respondents asserted that their publications concerned matters of public interest, were made in good faith and without malice, and were federally protected by the First and Fourteenth Amendments.

The article begins with the assertion that in April, 1970, a federal "strike force" was sent to St. Louis to combat "organized crime"; and in January, 1970, petitioner appointed Mr. Morris Shenker, a prominent local attorney, as Chairman of a newly formed St. Louis Crime Commission. Petitioner and Shenker declared that the Commission would seek public support to alleviate the street and

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[1] At petitioner's request the Clerk of the Court of Appeals for the Eighth Circuit has sent a certified transcript of the record herein to the Clerk of this Court. Included is the three volume printed Appendix filed in the Court of Appeals. References to that Appendix will be designated "(A. Vol. ...., p. ...)". References to the Appendix attached to this Petition will be designated "(Appendix, *infra*, p. ...)".

A reproduction of the May 29, 1970, edition of Life appears at A. Vol. III, Tab No. 1; and a copy of the pre-publication press release appears in the same volume, Tab No. 30.

ghetto crime that made people afraid to walk the streets of St. Louis.[2]

Life labeled Shenker "the foremost lawyer for the Mob in the U.S." and concluded that his appointment, coupled with the failure of the Commission to take on organized crime, made the St. Louis crime fight "phony" or "two-faced" (A. Vol. I, p. 159).[3] According to Life, appointing Shenker Chairman of the Commission constituted a "tie" between petitioner and the underworld.[4]

The other "tie" to the underworld that Life attributed to petitioner was said to be provided by Mr. Anthony Sansone, his friend of long standing, campaign manager and, on occasion, his business associate. Mr. Sansone was described as a "socially prominent real estate and insurance man". He is also, as Life said, the son-in-law of James Michaels.

Michaels was described as a notorious gunman and gang leader who is engaged in gambling and bookie operations, runs the "Syrian Mob" as an ally with the St. Louis Mafia headed by Anthony Giardano, and is the most "effective

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[2] This Commission was created by local ordinance for just that purpose. The ordinance designated Circuit Court Judges, prosecuting attorneys and key Aldermen to be members. Petitioner appointed college professors, insurance executives, a former U. S. Attorney and leaders in juvenile correction. All served without compensation except the Executive Secretary. Petitioner appointed former Chief of Police Curtis Brostron to that post. Respondent Walsh called him "impeccable" (A. Vol. I, p. 166).

[3] By law, the police force of St. Louis is completely controlled by a Board of Police Commissioners appointed by the Governor of Missouri. The Mayor of St. Louis is an ex officio member. He has no law enforcement power except the prosecution of the likes of traffic violations, after arrest by state police.

[4] About 65% of the eight-page article is devoted to Shenker's criminal law practice and complex business interests. Petitioner was not said to and did not have any significant connection with them.

entrepreneur" of the Mob in politics and legitimate business. Sansone was labeled "the Mayor's liaison" with these mobs, especially with Michaels.

To back up its theme that petitioner has business and personal ties with gangland, Life charged that on three occasions he consorted with Michaels through Sansone. A fourth libel declared in the following words that Michaels wrote insurance through petitioner:

> "Indeed, mobster Jimmy Michaels himself wrote insurance through Cervantes' firm until 1962 when a new law authorized the state to refuse a brokerage license to anyone who had been convicted of a felony. That supposedly finished Michaels' insurance career, although he was, by all accounts, a persuasive salesman while it lasted."

Miss Janice Pikey, a young Life investigator, provoked this defamation. In January, 1970, at the Missouri Division of Insurance in Jefferson City, she saw that on Michaels' 1962 application to renew his broker's license he listed Cervantes' agency as one of three to receive a copy of his license, if renewed.[5] She also saw that on April 20, 1962, Mr. T. B. Stegeman, head of the Brokers Division, sent a form letter to the three agencies listed. In essence,

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[5] A copy of this application is included in the Appendix, Volume III, Tab No. 29. The pertinent part reads:

> 9. I UNDERSTAND THAT I MAY NOT PLACE ANY BUSINESS WITH AGENTS OR DOMESTIC COMPANIES WITH WHOM I HAVE NOT FILED A COPY OF MY CURRENT BROKER LICENSE. Please issue duplicate copies of my broker license, if granted, to be filed with the following domestic companies or licensed agents: (Duplicate copies are 25¢ each)

Name	Address
Webbe-Brine Insurance	2110 South 39th St., St. Louis, Missouri
Bland & Company	319 North 4th St., St. Louis, Missouri
Cervantes-Cobb-Walsh Gen. Ins. Agency	3910 Lindell Blvd., St. Louis, Missouri

the letter sought verification of whether Michaels had brokered any business with these agencies during the preceding year and, if so, directed that a detailed transcript of such business be returned.[6] All three agencies answered. Two returned a transcript of insurance Michaels had brokered with them with all the details requested. Mr. George Heckman, Vice-President of the Cervantes' agency, replying for it, returned the letter after writing on it: "Mr. Stegeman. We have nothing for this man at present. Understand he wants to broker business with us."

Miss Pikey then interviewed Mr. Jack L. Clay and Mr. T. B. Stegeman, President and Vice-President respectively of Continental Security Life Ins. Co. in Jefferson City. In 1962, Mr. Clay was Superintendent of Insurance, the highest ranking official in the Missouri Division of Insurance. It was by his authority that Michaels' application for license renewal was rejected, as the article stated.

The Affidavits of Messrs. Clay and Stegeman show that during their thirty-minute interview with Miss Pikey they told her that Mr. Heckman's handwritten answer meant that Michaels had *not* written insurance through Cervantes "and it was so understood by the Division of Insurance" (A. Vol. II, pp. 494, 497). They also told her that listing agencies to receive a copy of his license, if renewed, did *not* mean that a broker had done business with those agencies. (Under Missouri law an agency cannot deal with an unlicensed broker.)

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[6] The letter appears in the Appendix, Volume III, Tab No. 16. The relevant text states:

> "The applicant has stated that he has brokered business through your agency in the past twelve months. Please verify this information and if true, furnish a complete transcript of this business to read as follows:
>
> Name of the Insured, Title of coverage,
> Amount of premium, Date of policy,
> Face amount of policy."

Miss Pikey thought "some girl", who was a secretary or clerk, told her that listing agencies on an application meant that the applicant had brokered insurance with them. She did not know this girl's name nor could she describe her (A. Vol. I, pp. 221-222).

The Affidavit of Mr. George Heckman, based upon an exhaustive inspection of Cervantes agency's records as far back as 1959, shows that Michaels had never brokered one policy of insurance through a Cervantes' agency, nor had he been paid one cent of commission.[7]

It is admitted that no one at Life had so much as seen or heard of a single policy of insurance that Michaels brokered through Cervantes.

When questioned about aggravating this falsehood by adding that Michaels "was, by all accounts, a persuasive salesman while it lasted", Walsh said Senior Editor Sackett put that in (A. Vol. I, pp. 186-187) and it referred to the insurance Michaels wrote through Bland! (A. Vol. I, pp. 188-189).[8]

To show that petitioner had "personal ties" with gangland, Life published and its press release repeated:

> "Although Cervantes has a steady liaison with the St. Louis underworld through Sansone, he has been fairly discreet about fraternizing personally with top-level hoodlums. One exception was a gathering at Sansone's home following the funeral of Jimmy Michaels' wife in 1967. In attendance were the royalty

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[7] The Heckman Affidavit is set out in the Appendix, Volume II, page 498.

[8] In the recent book "Payoff" by Michael Dorman, published by David McKay Company, Inc., 1972, the author reviewed the Life article as stating that when Michaels was denied a license, he was "forced to give up a lucrative affiliation with Cervantes's firm". (Page 31)

> of organized crime in St. Louis: Mafia boss Tony Giardano, his underboss John Vitale, Buster Wortman of East St. Louis, Mafia lieutenant Shorty Caleca and a dozen others. Also there, helping his friend Sansone tend bar for the guests, was the mayor."

Walsh said he based this on a copy of a confidential report from the files of the United States Department of Justice.[9] It is a report of an unknown informer—who also said Mr. Stanley Musial attended this get-together.

Walsh knew far more than the bare contents of the informer's report. In January, 1968, when he was a reporter for the St. Louis Globe-Democrat newspaper, he tried to publish the same story there. When the publisher learned that Walsh had never spoken to one person who would verify the Mayor's presence at this get-together, both the Mayor and Sansone were called and their conversations recorded on tapes which Walsh took with him to Life magazine.

Sansone said that over one hundred people came to his home that day and he vehemently denied that petitioner was one of them. Petitioner positively and vehemently denied being at this get-together, telling the publisher that he attended the funeral Mass for Mrs. Michaels and then went immediately to his office at the City Hall to meet with Mr. Joseph Griesedieck and others. Walsh was present when the publisher of the paper taped his conversation with Mr. Stanley Musial who denied being at the Sansone home. The Affidavit of publisher Bauman states that since Walsh did not know of a single person who could verify his story, when this was balanced against the positive denials of petitioner, Sansone and Mr. Musial, "responsible journalism required that the article should

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[9] A copy of this report is included in the Appendix, Volume III, Tab No. 4.

not be published and the Globe-Democrat did not publish it" (A. Vol. II, p. 492).

For the next two years, Walsh made no effort to verify this story—except for one highly significant matter. He directed Mr. Ralph Salerno, one of Life's investigators, to call on Mr. Griesedieck in St. Louis and find out whether he met with the Mayor at his office on the morning of this incident. *When Salerno reported that Mr. Griesedieck verified this meeting, Walsh ended his investigation of the Mayor's whereabouts then and there.* No reason was offered for aborting Salerno's investigation.

After suit was filed, respondents requested and received a copy of petitioner's official appointment book for the day in question. It documents the Mayor's whereabouts hour by hour and names the people who were with him. It was physically impossible for petitioner to have been at the Sansone home that day.

Confronted with all this, Walsh claimed that shortly before publication he called his "people" in the Department of Justice, asked them to "check" on the informer's reliability, and they reported that he is considered reliable by the Department of Justice. He refused to name these "people", citing as one reason his fear that they would be reprimanded or lose their job (A. Vol. I, pp. 31-32, 40). He also asserted a nontestimonial privilege under the First Amendment and a New York State Statute.

Throughout his deposition, when Walsh claimed to have received information from employees in the Department of Justice, he was called upon to identify them and refused for the above reasons.

To back up its accusation that petitioner was "tied" to Michaels through Sansone, Life stated:

> "Through Sansone, Cervantes has sought and received the counsel of this powerful gang leader. In December 1964, just two days after Cervantes declared his candidacy for mayor, he met with Sansone and Michaels to plan campaign strategy. The meeting took place in the offices of Rite Way Cigarette Sales, a Mob-controlled vending machine firm, incorporated, incidentally, by Attorney Morris Shenker."

To support this defamation Walsh produced another of what he said was a copy of a confidential report out of the files of the Department of Justice.[10] Michaels and Sansone were positively identified. Petitioner was called "an individual believed to be Al J. Cervantes". No conversation was reported.

Walsh admitted that from the way this report was worded he had doubt as to whether it was petitioner who was present (A. Vol. I, pp. 140-141); he admitted also that the report said nothing about meeting "to plan campaign strategy" or that petitioner "has sought and received the counsel of this powerful gang leader." Walsh claimed that in January, 1969, four years after the event covered in the report, he asked his "people" in the Department of Justice to verify Cervantes' identity. They not only did that, they "volunteered" that petitioner sought Michaels' counsel in planning campaign strategy (A. Vol. I, pp. 31-32).

Petitioner's Affidavit shows he has never been in the offices of Rite Way, and has never sought or received counsel from or planned campaign strategy with Michaels either alone or with Mr. Sansone (A. Vol. II, p. 510).

Mr. Sansone's Affidavit shows that he has never brought petitioner and Michaels together at Rite Way or any other place (A. Vol. II, p. 507).

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[10] This report is included in the Appendix, Volume III, Tab No. 2.

The remaining defamation complained of is of the same genre as the preceding one. Life published:

> "The following March, after Cervantes had won the primary, Sansone met again with Michaels at Rite Way to talk over Cervantes' prospects for the general election. This time Giardano, the Mafia boss, sat in too."

Again, Walsh claimed this defamation was based on "a Government report and conversations . . . with employees of the Justice Department" (A. Vol. I, p. 144).[11] The "report" shows it is based on a memorandum prepared by Sgt. Ed Schaaf of the Intelligence Unit of the St. Louis Police Department, dated March 26, 1965.

Walsh admitted that this report was silent about two things that he published: it did not say that Sansone participated in any conversation, and it did not say that he "met . . . to talk over Cervantes' prospects for the general election".

Again, four years after the event, Walsh claimed he called his "people" in the Department of Justice: ". . . I especially wanted to know if Mr. Sansone was participating in the conversation" (A. Vol. I, p. 150). They checked and said that he was and the conversation was about Cervantes' chances in the coming general election (A. Vol. I, p. 147).

Sgt. Schaaf reviewed the original report he filed with the St. Louis Intelligence Unit and averred that Sansone was walking out the door as he entered Rite Way and, when he overheard mention of the coming election, Sansone was gone. Moreover, the Mayor's election was not

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[11] The report is included in the Appendix, Volume III, Tab No. 3.

mentioned.[12] Sansone emphatically denied ever discussing petitioner's election with Michaels or Giardano.

The depositions of Life's editors who assisted in the preparation of the article revealed that their job was confined to screening the article's rhetoric. None had investigated, and none claimed to know the facts; each professed a good faith belief in the truth of the libels based solely upon Walsh's representations.

The deposition testimony of Mr. Thomas H. Flaherty, Jr., head of the Investigative Department, is typical of the others. He did none of the investigating. Along with the others, he decided on the choice of words. If he had known that Michaels' application for broker's license did not contain a declaration that he had written insurance through Cervantes, he would not have approved that part of the article (A. Vol. II, pp. 253-254, 258). He was not told of the Stegeman letter and the replies (A. Vol. II, pp. 254-255). He approved publishing that Michaels was "by all accounts a persuasive salesman" based solely on Walsh (A. Vol. II, p. 259).

If Mr. Flaherty had known that Walsh's Government "report" positively identified Michaels and Sansone but said that Sansone was accompanied by a man "believed to be Al J. Cervantes", it would have created enough doubt to be worthy of checking on (A. Vol. II, pp. 274, 277).

In wording the article to state that Sansone met with Giardano and Michaels at Rite Way to talk over Cervantes' election prospects, Walsh said this was confirmed by "Government surveillance" (A. Vol. II, p. 284).

Flaherty approved publishing that petitioner tended bar for the hoodlums at Sansone's home because Walsh

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[12] Twenty-eight nominees were seeking fourteen Aldermanic seats in the same election.

said it was based on "Government surveillance" or "a Government report" (A. Vol. II, pp. 288-290). He did not say it was an "informer's report" (A. Vol. II, pp. 290-291). Walsh did not tell him that the Mayor vehemently denied being there (A. Vol. II, p. 291) and that Sansone denied the Mayor's presence (A. Vol. II, pp. 292). If he had done so, they "would have discussed the full picture of the denials" (A. Vol. II, p. 291). Nor did Walsh tell him that the St. Louis Globe-Democrat rejected the identical story when Walsh was a reporter for that newspaper (A. Vol. II, p. 292). If he had done so, "we would have discussed the further circumstances of the situation" (A. Vol. II, p. 293). Walsh did not tell him that Mr. Salerno verified that petitioner met at his office with Mr. Griesedieck and others immediately after the funeral Mass (A. Vol. II, pp. 295-296).

Respondents have never explained why Salerno's investigation was ended. Petitioner suggested to the courts below it was because Walsh feared that Salerno was but one small step from proving the falsity of what he was bent on publishing.

It is admitted that the article did not contain "hot news"; and Life had ample time to check for accuracy. The publication of any falsehood was not due to the pressure of time, or the need to publish the article in the May 29, 1970, issue (A. Vol. II, pp. 449-450).

Petitioner also took the deposition of Mr. William G. Hundley, an attorney of record for respondents. Mr. Hundley had fifteen years experience in the Department of Justice, seven as Chief of the Organized Crime Section. A few days before the article was closed respondents asked him to "authenticate" the "confidential Government documents that Walsh had" (A. Vol. II, p. 390). Walsh had about a file cabinet full of "authentic FBI reports" which "certainly were confidential documents"

and were so stamped (A. Vol II, pp. 390-391, 407). He also had reports from Internal Revenue Service which were for interdepartmental use only (A. Vol. II, pp. 392-393).

Mr. Hundley testified that Department of Justice employees who gave Walsh copies of confidential reports, or told him what was in the files, did so in violation of Department regulations and their oath of office (A. Vol. II, pp. 391, 393-394, 399); and the Department of Justice would be better off "if it could weed out" those who turn over confidential information to private sources (A. Vol. II, pp. 402-404) because they have "performed a disservice to the Department" (A. Vol. II, p. 405).

The Proceedings Below

Petitioner filed his motion to compel Walsh to disclose the names of the Department of Justice "people" who supposedly "checked" confidential Government files in order to supply Walsh with what he needed for three of the libels. The motion averred that given the identity of these "people", petitioner could bring to light material evidence bearing upon respondents' malice; that such discovery would disclose (1) whether or not Walsh got any information from these "people" and, if so, (2) whether they gave him information he claimed, or (3) gave him other information that alerted him to falsity. The motion averred, also, that only by such compelled disclosure could petitioner learn the identity of these alleged "people".

Respondents filed their motions for summary judgment soon thereafter. Petitioner protested that under Rule 56 (f), Fed.R.Civ. P., the motions were not ripe for adjudication until he had completed the discovery sought in his motion to compel. The District Court sustained respondents' summary judgment motions and, because it did,

deemed it unnecessary to rule on petitioner's motion to compel (Appendix, *infra*, p. A-24).

The three judge panel of the Eighth Circuit found that the record material failed to show malice with "convincing clarity"; and, absent a "concrete demonstration" that the disclosure of Walsh's sources would lead to "persuasive evidence" of malice, Walsh was held to have a First Amendment privilege to withhold the identity of his claimed sources. Accordingly, the District Court's grant of summary judgment in favor of respondents was affirmed (Appendix, *infra*, p. A-15) and petitioner's petition for rehearing and, in the alternative, for rehearing en banc was denied (Appendix, *infra*, p. A-25).

REASONS WHY THE WRIT SHOULD BE GRANTED

I

Whether a newsman-defendant in a civil libel suit has a First Amendment privilege to withhold the identity of claimed sources of key information; if so, does the privilege extend to the identity of employees in the United States Department of Justice who are said by the newsman to have unlawfully "leaked" the key information from government files not available to the public.

The three judge panel of the Eighth Circuit has decided an important First Amendment question which has not been, but needs to be, settled by this Court. The panel Opinion has formulated a conditional First Amendment testimonial privilege for newsmen-defendants in civil libel suits. If allowed to stand unreviewed, it will create confusion and uncertainty for newsmen, their sources and the courts.

Moreover, by protecting unlawful activity in the gathering of news, the Opinion has distorted the First Amendment into fostering a disrespect for, and continued violation of, law.

A. Testimonial privilege for newsmen in civil cases.

The Opinion is the first of authority to erect a conditional testimonial privilege for newsmen in civil suits. The condition that will override the privilege is proof of malice with convincing clarity or "a concrete demonstration that the identity of news sources will lead to persuasive evidence on the issue of malice" (Appendix, *infra*, p. A-13).

The Opinion noted that in *Branzburg v. Hayes*, 406 U.S. ..., 92 S.Ct. 2646, this Court did not address the

question whether the First Amendment commands the grant of a newsman's privilege in civil suits. Nonetheless, the Eighth Circuit panel adopted the very rationale this Court rejected in denying newsmen a grand jury testimonial privilege. To condition a privilege, in civil suits, upon a concrete demonstration that malice will be proved with disclosure, has the same defects as conditioning a grand jury privilege upon a showing of a "compelling" or "paramount" interest.

"The practical and conceptual difficulties", pointed out in *Branzburg*, and ignored by the Eighth Circuit panel, are just as applicable in a civil libel suit: neither the reporter, nor his informant would know in advance whether a libel plaintiff might demonstrate that with disclosure he would find evidence of malice; and each judge would be required, under the different circumstances of each case, to make an ad hoc determination (or guess) as to what evidence a plaintiff might? could? must? produce by disclosure that would be "persuasive"—to him or a jury? To the informant "the prospect of being unmasked whenever a judge determines the situation justifies it is hardly a satisfactory solution to the problem." 92 S.Ct. at 2667.

The practical difficulties of the conditional grant in the case sub judice are immense. To require proof of malice before discovery is a classic example of putting the cart before the horse. To require a "concrete demonstration" that identity of sources would produce "persuasive evidence" of malice is almost as illogical. How is it to be demonstrated that undiscovered evidence will be persuasive? For example, petitioner does not accept as true Walsh's claims that Justice Department employees "checked" and then told him essential things without which three of the libels could not have been published in good faith. Petitioner contends that Walsh fabricated both the material and Government employees as its source. This contention is not frivolous: Walsh would convict

these employees of engaging in unlawful conduct[13] in order to pass false information, three to five years after the event, all tailored to his precise need.[14]

The Eighth Circuit panel did not deem this enough to override the conditional privilege; and left unanswered whether it fell short of a "concrete demonstration" or whether evidence of fabrication would not rise to "persuasive evidence" of malice. This Court declared in *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968): "Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant. . . ."

A conditional privilege in civil suits, no less than in the grand jury context, would "embark the judiciary on a long and difficult journey" to determine when and under what circumstances it would be applicable. The birthplace for a nontestimonial privilege is in the legislative branch. Missouri has chosen not to enact a newsman's statute. "The task of judges . . . is not to make the law but to uphold it . . ." 92 S.Ct. at 2669.

It is not unexpected that the novel privilege erected by the panel Opinion would bring its decision into direct conflict with the Second Circuit in *Garland v. Torre*, 259 F.2d 545 (2d Cir. 1958), where compelled disclosure of a reporter-witness' sources was affirmed.[15] Had the Opin-

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[13] This will be gone into more thoroughly in the second part of the discussion of this Question.

[14] In each instance petitioner produced hard evidence that such "information" was false. One example of how it was tailored to Walsh's need concerns the unknown informer relied upon to publish that petitioner acted as bartender for the Mob. Confronted with solid evidence of his unreliability, Walsh claimed that three years after the event reported these employees told him the informer was reliable (A. Vol. I, pp. 27-29, 128-129).

[15] The Opinion is in conflict, also, with District Court decisions in *Adams v. The Associated Press*, 46 F.R.D. 439 (S. D. Texas, 1969), and *Brewster v. Boston Herald-Traveler Corp.*, 20 F.R.D. 416 (D.C. Mass. 1957).

ion sub judice approached the *Garland* test and looked to whether the identity of Walsh's sources "went to the heart of plaintiff's claim", it would have reached the *Garland* result of compelled disclosure. Proof that Walsh fabricated both the guts of the libels, and their source, would certainly go to the heart of plaintiff's claim.

The conflict, in principle, with the decision of this Court and the direct conflict with the decision of the Second Circuit justifies the grant of certiorari to review the judgment below. It is justified, also, because a matter of importance to the press and those who will be publicized by it needs to be settled by this Court.

B. **Testimonial privilege for unlawful sources**

The panel Opinion has granted newsmen a nontestimonial privilege to protect (and thereby preserve) unlawful sources of news. Unlawful conduct has never before been tolerated by the First Amendment; and illegitimate news-gathering activity cannot be rationalized into an exception.

In "balancing" the interests involved, the Opinion overlooked that only legal interests are worthy of being weighed against the public's right to every man's evidence. See, e.g., *Blackmer v. United States,* 284 U.S. 421 (1932).

The Opinion's reliance upon statements of this Court in *Branzburg* (when dealing with *Caldwell*) is grievously misplaced. (Appendix, *infra,* p. A-10, n. 9; p. A-11, n. 10; p. A-15, n. 12) It overlooks, completely, that reporters Branzburg, Pappas and Caldwell were engaged in legitimate news-gathering activity. The majority and dissenting opinions were concerned for the right of those reporters to be free of undue harassment and keep their *legitimate* sources of information from being "an-

nexed" by prosecutors.[16] Nothing in those opinions can be said to sanction the protection of unlawful sources of news. No advocate of a reportorial privilege has ever suggested that it include illegitimate news-gathering activities.

This Court, in *Branzburg*, went to considerable lengths to carefully point out that the First Amendment does not give the press "a constitutional right of special access to information not available to the public generally"[17], 92 S.Ct. at 2657. That unassailable principle was supported by a host of citations. See, e.g., *Zemel v. Rusk*, 381 U.S. 1, 16-17 (1965); *Toledo Newspaper Co. v. United States*, 247 U.S. 402, 419-420 (1918).

This case also involves the public's stake in the law enforcement objectives of the Department of Justice. The panel Opinion noted Mr. William Hundley's expertise in this matter (Appendix, *infra*, p. A-14, n. 11) but ignored his testimony that the Department would be a better one "if it could weed out" Walsh's informants who do a "disservice" to their Government by violating their oath and the regulations of the Justice Department (A. Vol. II, pp. 402-405).[18]

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[16] The exact opposite is true here. Walsh did not develop his own sources—he "annexed" the Department of Justice.

[17] The Freedom of Information Act, 5 U.S.C. § 552, specifically exempted from the information to be made available to the public certain inter-agency memoranda and investigatory files compiled for law enforcement purposes. § 552 (a)(4), (b)(5), (b)(7).

[18] Executive Order No. 11222, 30 Fed. Reg. 6469 (1965), pursuant to 3 U.S.C. § 301, provides:

> "Section 205. An employee shall not directly or indirectly make use of, or permit others to make use of, for the purpose of furthering a private interest, official information not made available to the general public."

The regulations of the Department of Justice provide:

> "Improper Use of Official Information.
>
> No employee shall use for financial gain for himself or for another person, or make any other improper use of, whether

Fair play and fundamental concepts of justice are also involved. "Investigative files often contain hearsay, gossip, and other remote information from which the government hopes to develop leads. Public disclosure of such trivia and possible falsehoods might work grave injury and injustice to those involved." (Quoted at *8 Wigmore, Evidence,* § 2378 (McNaughton rev. 1961), pp. 807-808). Indeed, as pointed out in the dissent of Mr. Justice Douglas in *Caldwell,* the power of Government is a "power to suffocate both people and causes. Those in power, whatever their polities, want only to perpetuate it." 92 S.Ct. at 2693. Justice Douglas was, of course, referring to the power of Government to retaliate against the press. The same power of the "ins" can also be used to destroy their political opponents by subtly "leaking" to friendly reporters some of the raw, unverified, unevaluated, hearsay information that finds its way into Government investigatory files.[19]

The protection and encouragement given to unlawful conduct in gathering news, and its neoteric sanctuary under the First Amendment, justifies the grant of certiorari to review the judgment below.

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by direct action on his part or by counsel, recommendation, or suggestion to another person, information which comes to the employee by reason of his status as a Department of Justice employee and which has not become a part of the body of public information." 28 C.F.R. § 45.735-10.

Federal Courts take judicial notice of the regulations of the Department of Justice and they "have force of law".

[19] The St. Louis Post-Dispatch reported on March 9, 1971, page 3A, that when the very material involved in this case was brought to the attention of the Senate Judiciary Subcommittee on Constitutional Rights by San Francisco Mayor Joseph Alioto, Attorney General Richard Kleindienst requested Time-Life to return FBI records, including those used in this case.

II

Whether a publisher who proclaims that his publication is a report of his year-long investigation of the facts should, for purposes of malice, be held to know what a reasonable investigation would have disclosed.

Underlying this question is the distinction between the publication of "hot news" and the publication of information of a different kind. Here, Life proclaimed at every turn that its article was an "Investigative Report" and was based upon its "year-long investigation of the situation in St. Louis."

The dictionary defines "investigate": "To follow up by patient inquiry or observation; to inquire and examine into with systematic attention to detail and relationship; . . ." Webster's International Dictionary, 2nd Ed., p. 1306. Hot news, on the other hand, has an immediacy about it that requires its publication while still current and before competition "scoops" it.

Thus, the reporting of hot news, by its very nature, allows little or no time to investigate whereas an investigative report is freed from the pressure of meeting a deadline and, by its very nature, requires a thorough ferreting out of the facts. Life's editor admitted that its article was not hot news, and that any inaccuracies in it were not caused by lack of time or resources.

The distinction between hot news and investigative reports, in the context of libel actions, was drawn by this Court in *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker,* 388 U.S. 130 (1967). In *Butts,* Chief Justice Warren emphasized that little effort was expended to investigate the facts in spite of the vehement denials of Coach Butts and he described the magazine's investigation as "slipshod and sketchy." The late Mr. Justice Harlan found liability from evidence showing "an extreme de-

parture from the standards of investigation and reporting ordinarily adhered to by responsible publishers."

Following this Court's lead in *Butts*, the Second Circuit in *Goldwater v. Ginzburg*, 414 F.2d 324 (1969), recognized that a publisher should be held to a stricter responsibility for accuracy when publishing an investigatory report. Similarly, in *Blanke v. Time, Inc.*, 308 F.Supp. 378 (E. D. La. 1970), the District Court perceived the distinction between two kinds of news and thought that the test for malice should gauge the degree of care required before publication by the amount of time and opportunity available. *Id.* at 383 (footnote 10).

Thus, every court confronted with the problem has recognized that a "substandard" investigation may warrant a finding of malice when the publication does not contain hot news. Others have echoed the same concept. In *Hanson, Libel and Related Torts*, Vol. I (1969), published by the American Newspaper Publishers Association Foundation, the distinction is articulated in these words: "Where any publication covers matter other than 'hot news', a stricter responsibility for accuracy is imposed." *Id.* at p. 75. See, e.g., *Reporters and Their Sources*, 80 Yale Law Journal 317 (1970), where it is stated that proof of malice may be made "by showing that a newspaper has deviated substantially from standards of good investigation and reporting'." *Id.* at 361.

Since this Court's decision in *Butts*, the concept of a different standard for proof of malice, when publishing other than hot news, has taken hold. Yet, no guidelines have emerged by which to delineate what standard would still be in compliance with *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Thus, lower courts have been left to their own devices, so to speak, to devine when an investigation is "slipshod and sketchy" or constitutes an

extreme departure from the standards of investigation ordinarily adhered to by responsible publishers.[20]

This Court has consistently stated that it will, on a case by case basis, make certain that First Amendment demands are met. The need of both the press and courts for guidance in this important area of libel law justifies the grant of certiorari to review the judgment below.

A subsidiary question arises when a publisher voluntarily, indeed intentionally, goes out of his way to impress upon his readers that he conducted a year-long investigation of the facts before publishing his report. Such self praise is obviously indulged to induce reliance upon the truth of the publication.

This special credibility with which Life endowed its article was "ideologically neutral" in that it added nothing to the article's expression of ideas and lacked any informational value for the public.

It is nothing more than self-aggrandizing conduct that falls outside the range of First Amendment protections for free press as defined by *New York Times* and its progeny. Free press would neither be proscribed nor chilled if Life is held to its word.

When once it is recognized that Life's declarations about its investigatory activities do not rise to constitutional proportions, the issue comes into clearer focus. There is no just reason why respondents here should not be held to their word just as every declarant is held to his when he invites others to rely upon it.

Moreover, if respondents are not to be held accountable for their representations, they will receive an unjust en-

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[20] The publisher of the St. Louis Globe-Democrat refused to publish Walsh's story that petitioner was bar-tender for the Mob, because "responsible journalism" would not permit it (A. Vol. II, p. 492).

richment in that Life's public believed what Life claimed for itself. Equitable principles of estoppel are applicable. Either Life should be held to have known what a reasonable investigation would have disclosed or it should be estopped from asserting that its failure to investigate does not constitute proof of malice. A fair reading of the record in this case shows that a minimal investigation of the published libels would have revealed their falsity.

CONCLUSION

If allowed to stand, the Opinion below will create confusion and uncertainty for newsmen, their sources, and the courts; and it will be the first to give First Amendment sanction to unlawful conduct; it also points up important areas in federal supervision of state libel law enforcement that needs to be clarified for the courts and the press. For these and the other reasons stated herein this Petition for Writ of Certiorari should be granted.

Respectfully submitted

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November 15, 1972

Certificate of Service

I hereby certify that on this 14th day of November, 1972, three copies of the Petition for Writ of Certiorari were delivered to Mr. Robert S. Allen, c/o Lewis, Rice, Tucker, Allen and Chubb, Attorneys for Respondent Time,

Inc., 611 Olive Street, St. Louis, Missouri 63101; and to Mr. D. Jeff Lance, c/o Cook, Murphy, Lance & Mayer, Attorneys for Respondent Denny Walsh, 611 Olive Street, St. Louis, Missouri 63101. I further certify that all parties required to be served have been served.

Mortimer A. Rosecan
Rosecan and Popkin
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Attorneys for Petitioner

APPENDIX A

OPINION
OF

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 71-1555

Alfonso J. Cervantes, Appellant,

vs.

Time, Inc., and Denny Walsh, Appellees.

Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: April 11, 1972.

Filed: July 20, 1972.

Before VAN OOSTERHOUT, Senior Circuit Judge, MEHAFFY and STEPHENSON, Circuit Judges.

STEPHENSON, Circuit Judge.

Alfonso J. Cervantes is the mayor of Saint Louis, Missouri. In May 1970 there appeared in appellee's Life magazine an article of 87 paragraphs accusing the mayor of maintaining "business and personal ties with the gangsters that operate in his city." The article was

entitled "The Mayor, The Mob and The Lawyer," and captioned with a comment explaining: "Both the mayor and his new crime commissioner have personal ties to the underworld." The substance of the article describes in some detail the relationship said to exist between Mayor Cervantes, Morris Shenker,[1] a Saint Louis criminal lawyer and then the mayor's appointee "to head [the] newly formed Commission on Crime and Law Enforcement," and Tony Sansone[2] who, according to the article, is "the mayor's liaison with the two mobs that run the St. Louis underworld."

Mayor Cervantes instituted this diversity libel action in the United States District Court for the Eastern District of Missouri seeking $2,000,000 compensatory and $10,000,000 punitive damages. He sought relief against and named as defendants the publisher of Life magazine and the reporter whose investigative efforts produced

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[1] Mr. Shenker is characterized by the article as "the foremost lawyer for the mob in the U.S." "His relations with some of the nation's top hoodlums, Life's investigations show, go far beyond legal representation." The article describes Mr. Shenker as "a brilliant organizer of labyrinthine business and financial schemes which dazzle and befuddle the government," and as one who "would have to do little more than to tell what he already knows about organized crime to go a long way toward breaking its back in St. Louis and several other places as well."

[2] Life has this to say about Mr. Sansone:

> "The man closest to Cervantes, as friend, business associate, campaign manager and unofficial but forceful influence around city hall, is Tony Sansone. A wealthy and socially prominent real estate and insurance man, Sansone is, to begin with, the son-in-law of Jimmy Michaels, a notorious gunman and gang leader whose record goes back to the shooting wars of the '20s in St. Louis. Michaels runs the Syrian Mob, an ethnic gang that coexists these days as an 'ally by treaty' with the Sicilian Mafia family in St. Louis headed by Anthony Giardano. Michaels' general franchise is the gambling and bookie operations in south St. Louis. He is also the most effective entrepreneur in either mob in politics and legitimate business."

grist for the article.[3] He alleged in his amended complaint that 4 paragraphs of the article contained false statements which were authorized, published, and communicated with knowledge of their falsity or, alternatively, with reckless disregard as to their truth.[4] The defendants answered raising both the defense of truth and constitutional privilege.

The mayor undertook extensive pre-trial discovery. He deposed the reporter who testified that he gathered information which formed the basis for most of the story from informants within the Federal Bureau of Investigation and within the United States Department of Justice. He revealed that these informants furnished him copies of confidential reports and orally transmitted additional and supplemental corroboratory information from which he constructed the events embodied in 3 of the 4 disputed paragraphs, but he refused, under repeated questioning, to divulge the names of the individuals from whom he extracted this information. That refusal was bottomed on the theories (i) that to assume a contrary position would be to subject his informants to retaliation or reprisals and physical danger; (ii) that compulsory disclosure of confidential sources would violate the First Amendment's freedom of the press by impeding the dissemination of news which can be obtained only if he,

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[3] The article was published under the reporter's by-line. The record reveals that although ultimate editorial responsibility for the article's content rested with Life's Associate and Managing editors, the reporter shared, with others, draftsmanship duties.

[4] The mayor bases part of his action on the prepublication press release which Life dispatched to herald the coming of the article. The complaint charges that this release was transmitted by the publisher to radio and television stations throughout Missouri and elsewhere to stimulate reader interest. The release invited and authorized the media to announce that the forthcoming issue of Life would report that its years-long investigation disclosed, *inter alia*, that Mayor Cervantes has business and personal ties with the gangsters that operate in Saint Louis.

as a professional journalist, may effectively guarantee anonymity of the source; and (iii) that he, as a professional journalist and as a resident and citizen of the State of New York, possesses a statutory reportorial privilege to withhold the sources of news coming into his possession.[5] The mayor promptly moved for an order to compel disclosure of the identity of the informant[s]. The defendants responded by moving for summary judgment on the ground that each had acted in good faith in publishing the article and that both believed all of the allegedly defamatory statements to be true.

The District Court (The Honorable James H. Meredith, Chief Judge), did not reach the merits of the motion to

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[5] This aspect of the reporter's refusal is rooted in N.Y. Civil Rights Law, § 79-h (McKinney 1970). Subparagraph (b) of the statute provides, in substance, that a professional journalist shall not be adjudged in contempt by any court for "refusing or failing to disclose any news or the source of any such news coming into his possession in the course of gathering or obtaining news for publication or to be published in a * * * magazine * * * * * * * by which he is professionally employed or otherwise associated in a newsgathering capacity." The law of Missouri recognizes no such privilege.

We have been referred to no New York case defining the scope of this statutory privilege. Nor have we found a New York case affording precedent from which we can determine whether the statute draws a distinction based on the context in which the privilege is asserted. But see *People v. Wolf*, 329 N.Y.S.2d 291 (Sup. Ct. New York County 1972), and *In Re WBAI-FM*, 326 N.Y.S.2d 434 (Albany County Ct. 1971).

The scope of discovery permitted by Fed. Rules Civ. Proc. Rule 26(b)(1), 28 U.S.C.A. is limited to matters not privileged. This case presents the somewhat unusual situation where a deposition is being taken in New York for use in an action based on diversity of citizenship pending in a United States District Court sitting in Missouri, and the witness, a citizen of New York, claims a testimonial privilege not recognized in Missouri. In determining the validity of the asserted statutory privilege, a court is faced with the question whether to apply federal law or State law; and, if State law is to control, is it to be applied under the so-called *Erie* doctrine, see *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), or under Fed. Rules Civ. Proc. Rule 43(a), providing, *inter alia*, that evidence shall be admitted if it is admissible under the rules

compel. However, on the basis of a well-developed record consisting of affidavits, depositions, and other documentary evidence, it entered summary judgment for the defendants on the grounds that neither defendant had knowledge of falsity, that neither entertained serious doubts as to the truth of any statement in the article, and that neither acted with reckless disregard for truth or falsity. 330 F. Supp. 936, 940 (1970). This appeal followed.

I

In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), it was established that the First and Fourteenth Amendments, protection of speech and the press restrict the

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of evidence in the courts of the State in which the federal court is situate? Once these questions have been resolved, the court must determine whether to apply the law of the trial State or that of the deposition State.

This court long ago adopted the rule, said to comport with the "weight of authority", see *Massachusetts Mutual Life Insurance Company v. Brei*, 311 F.2d 463, 465-66 (CA2 1962), that State, not federal, law is determinative of evidentiary problems arising in a diversity case. See, *e.g., Bennett v. Wood*, 271 F.2d 349, 351 (CA8 1959) (burden of proof); *Severson v. Fleck*, 251 F.2d 920, 923-24 (CA8 1958); and *State Mutual Life Assurance Co. v. Wittenburg*, 239 F.2d 81, 89-90 (CA8 1957) (burden of proof). Similarly, it is well-settled law that a federal diversity court must apply the choice-of-law rules of the State in which it sits, here Missouri. *Klaxon Company v. Stentor Electric Manufacturing Co., Inc.*, 313 U.S. 487, 496 (1941). Applying these rules, we note that Missouri seemingly adheres to the generally accepted principle that the admissibility of evidence is governed by the law of the State where the testimony is to be heard. *Rosser v. Standard Milling Company*, 312 S.W.2d 106, 110 (1958), and *Prentiss v. Illinois Life Ins. Co.*, 225 S.W. 695, 702 (1920). Thus, by this analysis, New York's law as to the testimonial privilege of a journalist does not apply, and the reporter is entitled to no protection on that ground. Compare *Application of Cepeda*, 235 F.Supp. 465 (SD NY 1964). The same result would follow application of the proposed Rules of Evidence for the United States Courts and Magistrates, albeit for different reasons, See 51 F.R.D. 314, 356, 358-60.

enforcement of State libel laws. *Times* accordingly held that a public official may recover damages "for a defamatory falsehood relating to his official conduct" only if he "proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.*, at 279-80. The holding of *Times* was reaffirmed and the reckless disregard aspect of its actual malice standard amplified in *St. Amant v. Thompson*, 390 U.S. 727 (1968). The Court said with respect to this aspect of the constitutional standard:

> "[R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice." 390 U.S., at 731.

It is clear, finally, that the conditional privilege granted by *Times* to false defamatory expression no longer is confined to statements concerning public officials. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), holds that constitutional protection is to be extended to "all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous." *Id.*, at 44. Thus, "the determinant whether the First Amendment applies to state libel actions is whether the utterance involved concerns an issue of public or general concern." 403 U.S., at 44.

Since the statements in suit are conceded by all to touch and concern issues of public or general concern, it is clear that Mayor Cervantes cannot, absent a showing of actual malice, recover damages under the Missouri law

of defamation.[6] The District Court concluded, and the defendants here suggest, that because substantial editorial effort was expended to secure independent corroboration of the published materials, the mayor cannot meet the applicable constitutional standard of proof.

II

Without question the article fashions a broadside attack on the ability of Mayor Cervantes to perform responsibly in the governmental domain. It directs sharp and coarse comment both toward his official conduct and also his fitness for office. Indeed, the entire thrust of the article's message is that the mayor, despite public pronouncements to the contrary, seemingly possesses substantial personal and business interest in the perpetuation of profitable criminal activity in his city. Yet in the face of this massive attack on his fitness to occupy his important office, the mayor takes issue with but 4 of the 87 paragraphs comprising the article.[7] So far as the vast amount of the other material is concerned, its truth is either admitted or not explicitly denied. Thus, we are

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[6] Various aspects of the Missouri law of defamation have received the careful attention of this court in previous cases. See, *e.g., Ruderer v. Meyer*, 413 F.2d 175 (CA8 1969), certiorari denied 396 U.S. 936; *Underwood v. Woods*, 406 F.2d 910, 915 (CA8 1969); *Walker v. Pulitzer Publishing Co.*, 394 F.2d 800 (CA8 1968); *Pauling v. Globe-Democrat Publishing Co.*, 362 F.2d 188 (CA8 1966); certiorari denied 388 U.S. 909; and *Riss v. Anderson*, 304 F.2d 188 (CA8 1962). The Missouri law recognizes a qualified privilege in the news media to comment on matters and persons of public concern so long as the account is fair and not actuated by malice. See *e.g., Moritz v. Kansas City Star Co.*, 258 S.W.2d 583 (1953). This privilege is an affirmative defense which must be proven by the defendant. *Walker v. Kansas City Star Co.*, 406 S.W.2d 44 (1966). See also *Pulliam v. Bond*, 406 S.W.2d 635 (1966).

[7] In his Reply Brief on this point the mayor asserts that most of the other material did not pertain to him. In the light of Mayor Cervantes' relationship with Commissioner Shenker, however, a fair reading of the record leaves us with the contrary inference.

concerned here with only the comparatively few words said by the mayor to be false and defamatory, and as to these, he acknowledges that the burden is his to establish with "convincing clarity" deliberate or reckless error. *Times, supra,* at 285-86.

Central to the mayor's appellate attack is his contention that he cannot possibly meet his burden of proof if the reporter is allowed to hide behind anonymous news sources. He argues that in a libel case of this kind the identity of a reporter's sources is absolutely essential to the successful outcome of the lawsuit. His arguments in favor of compulsory disclosure may be summarized as follows: [a] disclosure enables the plaintiff to scrutinize the accuracy and balance of the defendant's reporting and editorial processes; [b] through disclosure it is possible to derive an accurate and comprehensive understanding of the factual data forming the predicate for the news story in suit; [c] disclosure assists successful determination of the extent to which independent verification of the published materials was secured; and [d] disclosure is the sole means by which a libeled plaintiff can effectively test the credibility of the news source, thereby determining whether it can be said that the particular source is a perjurer, a well-known libeler, or a person of such character that, if called as a witness, any jury would likely conclude that a publisher relying on such a person's information does so with reckless disregard for truth or falsity. Moreover, these particularized considerations are said to assume extraordinary importance when, as in this case, the information forming the core of the publication by its nature is not available to the public generally and is obtainable only from governmental employees who are under a duty not to reveal it to outsiders.[8] On the basis of these considera-

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[8] The reporter freely admits and positively asserts that certain key information used in preparation of the article was "leaked" to him by anonymous governmental employees. The mayor contends

tions, the mayor advanced arguments in the District Court that it should not reach the defense motion for summary judgment until he was given the opportunity to depose and examine the Federal Bureau of Investigation and Department of Justice employees who supplied Life's reporter with confidential reports and corroboratory materials used in connection with the article. The failure of the District Court to respond favorably to this plea is urged as error here.

These arguments in behalf of compulsory disclosure of confidential news sources, when urged on behalf of a public official whose reputation and integrity have been assaulted on the basis of information supplied by those sources, do not strike us as frivolous. Especially is this so when much of the information supplied by the anonymous informants has been obtained from the private files of Government. Nevertheless, on the facts of this particular case, we believe that in his preoccupation with the

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that the reporter helped himself to confidential information from government files and, in so doing, incited a violation of regulations designated as "*Prescribing Standards of Ethical Conduct for Government Officers and Employees,*" issued by President Johnson under authorization of 3 U.S.C.A. § 301. Exec. Order No. 11,222, 30 Fed. Reg. 6469 (1965) provides in pertinent part, that

> "Section 101. Where government is based on the consent of the governed, every citizen is entitled to have complete confidence in the integrity of his government. Each individual officer, employee, or adviser of government must help to earn and must honor that trust by his own integrity and conduct in all official actions.
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> "Section 205. An employee shall not make use of, or permit others to make use of, for the purpose of furthering a private interest, official information not made available to the general public."

Purloined governmental documents have been before the courts before. See *e.g., New York Times Co. v. United States*, 403 U.S. 713 (1971), and *Dodd v. Pearson*, 279 F. Supp. 101 (D. DC 1968). Compare *Liberty Lobby, Inc. v. Pearson*, 390 F.2d 489 (CADC 1968).

identity of Life's news sources, the mayor has overlooked the central point involved in this appeal: that the depositions and other evidentiary materials comprising this record establish, without room for substantial argument, facts that entitled both defendants to judgment as a matter of law, *viz.*, that, quite apart from the tactics employed in collecting data for the article, the mayor has wholly failed to demonstrate with convincing clarity that either defendant acted with knowing or reckless disregard of the truth.

We are aware of the prior cases holding that the First Amendment does not grant to reporters a testimonial privilege to withhold news sources.[9] But to routinely grant motions seeking compulsory disclosure of anonymous news sources without first inquiring into the substance of a libel allegation would utterly emasculate the fundamental principles that underlay the line of cases articulating the constitutional restrictions to be engrafted

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[9] The weight of decisional authority so holds. See *e.g., Garland v. Torre*, 259 F.2d 545, 548-9 (CA2 1958), certiorari denied, 358 U.S. 910; *State v. Buchanan*, 436 P.2d 729 (Ore. 1968), certiorari denied, 392 U.S. 905; *In re Taylor*, 193 A.2d 181 (Pa. 1963); and *In re Goodfader*, 367 P.2d 472 (Haw. 1961). See also, *Adams v. The Associated Press*, 46 F.R.D. 439, 440-41 (SD Tex. 1969); *Application of Cepeda*, n.5, supra; *Brewster v. Boston Herald-Traveler Corp.*, 20 F.R.D. 416 (D. Mass. 1957); and *Rosenberg v. Carroll In re Lyons*, 99 F.Supp. 629 (SDNY 1951). But see *In re Grand Jury Witnesses*, 322 F.Supp. 573, 576-78 (ND Cal. 1970).

In two recent cases, however, it has been held that a libel defendant's refusal to reveal the identity of its news sources need not bar the entry of summary judgment in its favor. *Konigsberg v. Time, Inc.*, 312 F.Supp. (SDNY 1970), and *Cerrito v. Time, Inc.*, 302 F.Supp. 1071 (ND Cal. 1969), *aff'd per curiam*, 449 F.2d 306 (CA9 1971). Implicit in each of these cases is tacit approval of the contention that the free flow of news obtainable only from anonymous sources is likely to be deterred absent complete confidentiality. Hence, each court seemed to reason that, absent a positive showing of relevance or materiality, a newsman need not divulge the identity of his confidential news informants.

Finally, in *Branzburg v. United States*, 406 US .... 92 S.Ct. 2646, 33 L.Ed.2d 626, (*Caldwell v. United States*) (1972), the

upon the enforcement of State libel laws.[10] Such a course would also overlook the basic philosophy at the heart of the summary judgment doctrine.

III

Some twenty years ago, this court, in *Traylor v. Black, Sivalls & Bryson, Inc.*, 189 F.2d 213 (CA8 1951), set forth the general policy of the circuit with regard to the entry of summary judgment. There it was said that:

> "A summary judgment upon motion therefore by a defendant in an action should never be entered except where the defendant is entitled to its allowance beyond all doubt. To warrant its entry the facts conceded by the plaintiff, or demonstrated beyond reasonable doubt to exist, should show the right of the defendant to a

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Supreme Court was asked to address the constitutional aspects of grand jury efforts to acquire from professional journalists information about possible law violations committed by their news source. See *Caldwell v. United States*, 434 F.2d 1081 (CA9 1970), certiorari granted, 402 U.S. 942; *In re Pappas*, 226 N.E.2d 297 (Mass. 1970), certiorari granted, *ibid.*; and *Branzburg v. Hayes*, 461 S.W.2d 345 (Ky. Ct. App. 1970), certiorari granted, *ibid.* It was held, over 4 dissents, that a newsman does not possess a First Amendment privilege to refuse to answer relevant and material questions asked during a good-faith grand jury investigation. Noting that "the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability," *Id.*, at 5030, the Court declined to exempt newsmen from the general obligation of all citizens "to answer questions relevant to an investigation into the commission of crime." *Ibid.* The Court was not faced with and, therefore, did not address, the question whether a civil libel suit should command the quite different reconciliation of conflicting interests pressed upon us here by the defense.

[10] Indeed, as the Court observed in *Caldwell*, n.9, *supra*, "without some protection for seeking out the news, freedom of the press could be eviscerated." 406 US at ..., 92 S.Ct., at 2656. Similarly, to compel a newsman to breach a confidential relationship merely because a libel suit has been filed against him would seem inevitably to lead to an excessive restraint on the scope of legitimate news-gathering activity.

> judgment with such clarity as to leave no room for controversy, and they should show affirmatively that the plaintiff would not be entitled to recover under any discernible circumstances." 189 F.2d, at 217. (Citations omitted).

Summary judgment, as the foregoing excerpt makes clear, is an extreme remedy to be granted only in those cases where there clearly is no genuine issue to be tried. But its extreme nature does not lighten the burden of a party against whom a motion therefor is interposed. Indeed, Fed. Rules Civ. Proc. Rule 56(e), 28 U.S.C.A., supplies the other side of the proposition recognized in *Black, Sivalls & Bryson.* In pertinent part, it is therein stated:

> "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

This aspect of Rule 56(e) has been followed in prior decisions of this court, both in summary judgment cases generally, *Lundeen v. Cordner,* 354 F.2d 401, 407-08 (CA8 1966), and in First Amendment libel cases in particular, *Hurley v. Northwest Publications, Inc.,* 398 F.2d 346 (CA8 1968), *aff'g per curiam,* 273 F.Supp. 967, 974-75 (D. Minn. 1967). It accords with recent constructions of Rule 56(e) by the Supreme Court, *Adickes v. Kress & Company,* 398 U.S. 144, 153, 160-61 (1970), and *First National Bank of Arizona v. Cities Service Co.,* 391 U.S. 253, 288-90 (1968), and it advances the important summary judgment objective of judicially assessing the proof to see where there is a genuine issue for trial.

Applying these rules to the case before us, the compulsory disclosure issue is drawn into clearer focus.

Where there is a concrete demonstration that the identity of defense news sources will lead to persuasive evidence on the issue of malice, a District Court should not reach the merits of a defense motion for summary judgment until and unless the plaintiff is first given a meaningful opportunity to cross-examine those sources, whether they be anonymous or known. For only then can it be said that no genuine issue remains to be tried. Thus, if, in the course of pre-trial discovery, an allegedly libeled plaintiff uncovers substantial evidence tending to show that the defendant's published assertions are so inherently improbable that there are strong reasons to doubt the veracity of the defense informant or the accuracy of his reports, the reasons favoring compulsory disclosure in advance of a ruling on the summary judgment motion should become more compelling. Similarly, where pre-trial discovery produces some factor which would support the conclusion that the defendant in fact entertained serious doubt as to the truth of the matters published, identification and examination of defense news sources seemingly would be in order, and traditional summary judgment doctrine would command pursuit of further discovery prior to adjudication of a summary judgment motion. The point of principal importance is that there must be a showing of cognizable prejudice before the failure to permit examination of anonymous news sources can rise to the level of error. Mere speculation or conjecture about the fruits of such examination simply will not suffice. *Hurley, supra,* p. 974 of 273 F.Supp.

But such is not this case. As the opinion of the District Court makes clear, the record contains substantial evidence indicating that it was over a period of many months that Life's reporter carefully collected and documented the data on the basis of which the article was written and published. In turn, Life's key personnel, including one researcher, four editors and three lawyers, spent countless

hours corroborating and evaluating this data. Once suit was instituted, the mayor was provided with hundreds of documents utilized in preparation of the article. He then deposed virtually every Life employee who possessed any connection whatever with the article's preparation and publication and, with one exception, each affirmed his or her belief in the truth of the article and each gave deposition testimony sufficient to raise a strong inference that there was good reason for that belief.[11] To rebut this evidence, and to support his claim that 4 of the 87 paragraphs conveyed false information, the mayor was content to present little more than a series of self-serving affidavits from himself and from Mr. Sansone, together with other evidentiary materials which framed but a minimal assault on the truth of the matters contained in the four paragraphs. Aside from this evidence, he has not produced a scintilla of proof supportive of a finding that either defendant in fact entertained serious doubts about the truth of a single sentence in the article. Neither has he come forward with competent evidence from which the District Court could reasonably discern the inherent improbability of the matters published. In short, the mayor's proof simply does not meet the standard traditionally required of one against whom a motion for summary judgment is interposed.

We have mentioned long-standing decisions of the Supreme Court making clear that the mayor is obligated to demonstrate with convincing clarity that the materials he alleges to be defamatory were published with knowledge of their falsity or with reckless disregard for their truth. Where, as here, the published materials, objectively

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[11] The single exception is this: one of Life's house counsel testified only that he had authenticated the genuineness of certain Government documents which had come into the possession of Life's reporter. He did not purport to pass on the truth or falsity of these purloined materials. This same employee formerly had served as Chief of the Department of Justice's Organized Crime section.

considered in the light of all the evidence, must be taken as having been published in good faith, without actual malice and on the basis of careful verification efforts, that is, they were published in good faith without regard to the identity of the news sources, there is no rule of law or policy consideration of which we are aware that counsels compulsory revelation of news sources.[12] Neither is there any evidence by which a jury could reasonably find liability under the constitutionally required instructions. When these factors conjoin, the proper disposition is to grant the defense motion for summary judgment.[13] The judgment of the District Court must therefore be affirmed.[14]

Affirmed.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

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[12] *Caldwell* makes clear that harassment of the press undertaken not for legitimate reasons is without justification. 406 U.S. ..., 92 S.Ct. 2646 (opinion of Powell, J.). To compel disclosure under the circumstances shown by this record would seem to constitute precisely the harassment *Caldwell* seeks to curb.

[13] Cf. *Thompson v. Evening Star Newspaper*, 394 F.2d 774, 776 (CADC 1968); certiorari denied, 393 U.S. 884; *Markus v. Penn Mutual Life Insurance Co.*, 389 F.2d 538, 545 n.9 (CADC 1967); and *Washington Post Co. v. Keogh*, 365 F.2d 965, 968 (CADC 1966), certiorari denied, 385 U.S. 1011.

[14] The result we reach in the instant case is not to be construed as precedent for the proposition that news reporters are free to roam at will through the private papers of Government in search of a news story. We hasten to emphasize that through enactment of the Freedom of Information Act, 5 U.S.C. § 552 (1970), *amending* 5 U.S.C. § 1002 (1964), the Congress has attempted to strike the proper balance between the public's "right to know" and the Government's need for secrecy. We note this Act provides that all Government files are to be made available by publication, or otherwise, unless expressly excepted by one of nine carefully delineated exceptions. As to the exceptions, see § 552(a)(4)(b)(5), (b)(7).

APPENDIX B

JUDGMENT

(Filed July 20, 1972)

Robert C. Tucker, Clerk
United States Court of Appeals
For the Eighth Circuit

Alfonso J. Cervantes,
Appellant,
vs.
Time, Inc., and Denny Walsh,
Appellees.

No. 71-1555.
September
Term, 1971.

Appeal From the United States District Court for the Eastern District of Missouri.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed.

July 20, 1972

APPENDIX C

MEMORANDUM OPINION

United States District Court,
Eastern District Missouri, Eastern Division
Alfonso J. Cervantes, Plaintiff,

v.

Time, Inc., and Denny Walsh,
Defendants.

No. 70 C 259(1).

Aug. 25, 1971.

* * * * * * *

MEMORANDUM

Meredith, Chief Judge.

This action for libel arises out of an article published in Life Magazine which dealt with the appointment by plaintiff of attorney Morris Shenker as head of the Commission on Crime and Law Enforcement. Plaintiff is the Mayor of the City of St. Louis, Missouri. The case is before the Court on defendants' motion for summary judgment and plaintiff's motion to compel defendant Denny Walsh to testify and reveal the persons who are the sources of his information. Both motions have been briefed, orally argued, and submitted to the Court.

In support of their motion for summary judgment, defendants contend that the article is protected by the First Amendment and that under the doctrine of New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.

2d 686 (1964), and its progeny, recovery cannot be had unless plaintiff can show that the defendants published false and defamatory material with a malicious intent to injure plaintiff by its falsity. Defendants further contend that plaintiff cannot, as a matter of law, meet the burden placed upon him to prove actual malice; that, therefore, summary disposition should be granted to obviate the chilling effect on freedom of the press caused by suits such as this.

Plaintiff contends that the motion for summary judgment is not ripe for decision at this time, because there is an issue of fact as to the truth of specific paragraphs in the article. The plaintiff further contends that there is an issue of fact as to the good faith of author, Denny Walsh, in refusing to reveal his sources, which has a bearing on the malicious intent of defendants, and that, therefore, summary judgment cannot be granted.

[1] Both parties agree that this case is governed by New York Times Co. v. Sullivan, supra. The controlling legal principal that has evolved from the New York Times Co. v. Sullivan case is that where a publisher deals with matters of legitimate public concern, the First Amendment protects him from claims for libel, unless he not only publishes false material, but does so with "actual malice", that is, with knowledge of its falsity or with reckless disregard for its truth or falsity. Monitor Patriot Co. v. Roy, 401 U.S. 265, 91 S.Ct. 621, 28 L.Ed.2d 35 (1971); Ocala Star-Banner Co. v. Damron, 401 U.S. 295, 91 S.Ct. 628, 28 L.Ed.2d 57 (1971); Time, Inc. v. Pape, 401 U.S. 279, 91 S.Ct. 633, 28 L. Ed.2d 45 (1971); St. Amant v. Thompson, 390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968); Curtis Publishing Co. v. Butts, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967); Garrison v. Louisiana, 379 U.S. 64, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964); Bon Air Hotel, Inc. v. Time, Inc., 426 F.2d 858 (5th Cir. 1970);

Rosenbloom v. Metromedia, Inc., 415 F.2d 892 (3rd Cir. 1969); United Medical Laboratories, Inc. v. Columbia Broadcasting System, Inc., 404 F.2d 706 (9th Cir. 1968); Cerrito v. Time, Inc., 302 F.Supp. 1071 (N.D.Cal.1969).

[2, 3] In St. Amant v. Thompson, supra, the Court explained that in cases concerning publications dealing with public figures and matters of public interest, as well as public officials, the plaintiff has the burden of proving malice with convincing clarity, and went on to explain the "reckless disregard" aspect of the actual malice rule:

> "These cases are clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice."

[4] The activities of organized crime are clearly matters of legitimate public concern and interest. The influence of organized crime and its activities are the subjects of vast expenditures of money and time by all branches of government, thus indicating the interest of the public, as well as the public's right to know and be informed of these activities. Plaintiff's activities in connection with organized crime, plus his being a public official, throw him into the public limelight. As a result, the mantle of constitutional protection covers the article upon which this suit is brought. Therefore, unless the plaintiff can show the requisite "actual malice", defendants are entitled to summary judgment.

The issue of Life Magazine for May 29, 1970, contained an eight-page article entitled "The Mayor, The Mob and

The Lawyer". The article was written by Denny Walsh, an associate editor of Life Magazine and a winner of the Pulitzer Price. The thrust of the article was that plaintiff, as Mayor of St. Louis, is conducting a "two faced" and "phony" fight on crime in the City of St. Louis by appointing attorney Morris Shenker as head of the Commission on Crime and Law Enforcement. The crux of the article is established by the following facts of which plaintiff does not complain or deny: (1) for over twenty years plaintiff and his campaign manager, Anthony Sansone, have been close personal friends; (2) Sansone is the son-in-law of St. Louis "gangster" James Anthony Michaels, Sr.; (3) Morris Shenker is the leading spokesman for organized crime in this country; (4) plaintiff appointed Shenker to head his Commission on Crime; (5) plaintiff, in describing the goals of the Commission on Crime, made no mention of organized crime existing in St. Louis; (6) plaintiff publicly denied the existence of organized crime in St. Louis; (7) the United States Government disclosed the existence of organized crime in St. Louis and sent a special task force to St. Louis for the purpose of dealing with organized crime.

The article then expands on this theme by pointing out plaintiff's personal and business ties with "mob figures in his city" through his relationship with Sansone and Shenker. Sansone, son-in-law of gangster James Anthony Michaels, Sr., is shown to have certain personal and business ties with members of organized crime. Through Sansone, plaintiff is linked to the same gangsters, including Anthony Giardano, who has been described as a leader in organized crime. Specific instances are cited in the article in which plaintiff, together with Sansone, met with these same persons for business or social affairs.

The plaintiff's wealth and business holdings are also discussed in the article, specifically, that plaintiff an-

nounced his intention to avoid a conflict of interest by putting his private business interests in trust. The article points out that the transfer to the trust was illusory, because in many instances it appeared that plaintiff retained his interests in the business.

The last part of the article expands upon Morris Shenker's relations with the nation's top hoodlums and concludes that these relations "go far beyond mere legal representation". The purpose of this part of the article was to substantiate the allegation that the appointment of Shenker to head the Crime Commission made the plaintiff's right on crime a facade so far as organized crime is concerned.

Plaintiff complains of only four of the eighty-seven paragraphs contained in the article. All other paragraphs in the article are either admitted or not denied by plaintiff for purposes of this motion. For convenience, the Court will hereafter refer to the paragraphs as they are numbered on a copy of the article that defendants have filed with the Court. The four paragraphs of which plaintiff complains are numbered 11, 12, 27, and 31.

Paragraph 11 stated that "[t]hrough Sansone, Cervantes has sought and received the counsel of this powerful gang leader [Michaels]. In December 1964, just two days after Cervantes declared his candidacy for mayor, he met with Sansone and Michaels to plan campaign strategy." Reports and exhibits filed by defendants reveal that the information presented in paragraph 11 is substantially contained in detailed F.B.I. reports obtained from the Department of Justice.

Paragraph 12 states that "[t]he following March, after Cervantes had won the primary, Sansone met again with Michaels at Rite Way to talk over Cervantes' prospects for the general election. This time Giardano, the Mafia boss, sat in too." Again, the matters contained in para-

graph 12 are substantially the same as, and corroborated by, a signed, dated report of the Intelligence Unit of the St. Louis Police Department. Although the libelous character of paragraph 12 with regard to plaintiff is unclear, paragraph 12 is substantially corroborated by the police department report.

[5] Paragraph 27 states that Michaels brokered insurance with the Cervantes agency. This statement is corroborated by two facts: (1) Michaels listed the Cervantes agency on his application for renewal of his broker's license, and (2) T. B. Stegman, head of the broker's section of the Division of Insurance, wrote a letter to George H. Heckman, president of Cervantes and Associates, Inc., in which he assumed that Michaels had brokered insurance through the Cervantes agency. The letter requested the agency to verify and furnish a transcript of this business to the Missouri Division of Insurance. The reply given by Heckman was that: "We have nothing for this man at present. Understand that he wants to broker business with us." From these documents and the reasonable inferences arising therefrom, the defendants could have reasonably concluded that Michaels brokered insurance with the Cervantes agency. Paragraph 27 does not constitute such an error of interpretation so as to rise to a level of reckless disregard of the truth. See Time, Inc. v. Pape, 401 U.S. 279, 91 S.Ct. 633, 28 L.Ed.2d 45 (1971).

Paragraph 31 states that plaintiff acted as bartender to the royalty of organized crime by serving drinks at Sansone's home following the funeral of Mrs. James Michaels, Sr. This paragraph is substantiated by an official F.B.I. report obtained from the Department of Justice by defendant Walsh.

[6] The Court finds that the corroboration of the paragraphs in dispute, coming from highly trustworthy reports

and documents, based upon police or F.B.I. investigations, is sufficient to negate malice. Whether true or untrue, paragraphs 11, 12, 27, and 31 are based upon substantial and credible reports and information. The paragraphs are not, as plaintiff contends, fabrications of the defendants with no substantial corroboration. The conduct of the defendants in printing these paragraphs was not highly unreasonable and did not constitute an extreme departure from the standards of investigation and reporting ordinarily adhered to by a responsible publisher. Defendant Time, Inc., additionally checked and verified the reports in such a manner that it had every reason to believe the truth of the statements contained in the reports. Plaintiff has wholly failed to establish "actual malice" or reckless disregard for the truth on the part of the defendants.

A fair reading of the entire eighty-seven paragraph article convinces this Court that the four paragraphs complained of here have little or no impact on the total article. In context, the four paragraphs are a minute and relatively ineffective portion of the article as a whole. In any event, the Court finds that paragraphs 11, 12, 27, and 31 of the article were published without malice and with due regard for the truth.

[7, 8] The depositions and biographical references file make it clear that defendants had no knowledge of falsity, no serious doubt concerning the truth of any statement in the article, and certainly no reckless disregard of whether or not statements in the article were false. Plaintiff has failed to produce or raise any issue as to actual malice on the part of the defendants. Furthermore, the issue of defendant Denny Walsh's good faith in not revealing his sources has no bearing on the malicious intent of the defendants under the facts of this case. Plaintiff has failed to present any evidence beyond his mere conclusionary affidavits, which would enable this Court to conclude that

defendant Time's asserted failure in requiring Walsh to disclose the identity of his sources was motivated by malice or reckless disregard. It should be emphasized that plaintiff must have proof, not mere allegation or conjecture in a libel case. As stated in Hurley v. Northwest Publications, Inc., 273 F. Supp. 967 (D. Minn. 1967), affirmed 398 F.2d 346 (8th Cir. 1968):

> "A mere chance that somehow, somewhere, on cross-examination or otherwise plaintiffs will uncover something which might add to their case but obviously of which now they have no knowledge, is mere speculation and conjecture and is not sufficient in view of the showing made here by the defendant." Id. at 974.

Accordingly, defendants' motion for summary judgment will be granted.

Plaintiff's motion to compel Walsh to reveal his sources will not be considered by the Court in view of the fact that the motion for summary judgment is being granted by the Court.

APPENDIX D

ORDER
OF
United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 71-1555. September Term, 1971

Alfonso J. Cervantes, Appellant,
vs.
Time, Inc. and Denny Walsh, Appellees.

Appeal from the United States District Court for the Eastern District of Missouri.

The Court having considered petition for rehearing en banc filed by counsel for appellant and, being fully advised in the premises, it is now here ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is now here ordered that the petition for rehearing also be, and it is hereby, denied.

August 17, 1972

APPENDIX E

ORDER
OF
United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 71-1555. September Term, 1971

Alfonso J. Cervantes, Appellant,

vs.

Time, Inc. and Denny Walsh, Appellees.

Appeal from the United States District Court for the Eastern District of Missouri.

On Consideration of the motion of appellant for a stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, it is now here ordered by this Court that the issuance of the mandate of herein be, and the same is hereby, stayed for a period of ninety days from and after this date, and if within said period of ninety days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari has been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

August 24, 1972

FILE COPY

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-727

ALFONSO J. CERVANTES,
Petitioner,

v.

TIME, INC. and DENNY WALSH,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-727

ALFONSO J. CERVANTES,

Petitioner,

v.

TIME, INC. and DENNY WALSH,

Respondents.

BRIEF FOR RESPONDENTS* IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

Petitioner, Mayor of St. Louis, seeks a writ of certiorari to the United States Court of Appeals for the Eighth Circuit which, on August 17, 1972, denied a petition for rehearing from its affirmance, on July 20, 1972, of summary judgment in favor of respondents in the District Court. Petitioner's suit is based on a claim of defamation in an article appearing in the May 29, 1970 issue of Life magazine, entitled "A Two-Faced Crime Fight in St. Louis". That article dealt with the amazing appointment by the Mayor of Morris Shenker, leading organized crime at-

*Petitioner and respondents are plaintiff and defendants, respectively, in the courts below and are generally referred to herein as such.

torney, as head of the St. Louis Commission on Crime and Law Enforcement.

OPINIONS BELOW

The opinion of the Court of Appeals (there were no dissents) is reported at 464 F.2d 986. It is annexed to the petition as Appendix A, pp. A-1 through A-15. The opinion of the District Court is reported at 330 F. Supp. 936 and is annexed to the petition as Appendix C (pp. A-16 through A-24).*

QUESTIONS PRESENTED

The questions sought to be presented by the petition (p. 2) were not reached below. Properly stated, the questions presented by this case are simply:

1. Are respondents entitled to summary judgment, under the First and Fourteenth Amendments, dismissing the complaint when both courts below found that they have made a conclusive showing, which has not been rebutted, that they did not have knowledge of falsity or serious doubts as to truth concerning the article, or any item appearing therein, upon which suit is brought?

2. Can the fact that the reporter—who investigated the facts upon which the article was based and who fully disclosed all written material utilized and the identity of most of the sources upon which he relied—refused to disclose the identity of a limited number of sources whose information confirmed reports which were utilized in connection with three paragraphs of

*For convenience, references herein to the opinions below will be to pages of the Appendix to the petition.

an 87 paragraph* article be allowed to deprive respondents of their right, for which they have qualified in every other element, to summary judgment with respect to an article dealing with a subject matter of the highest public interest, organized crime, when both courts below found, on the basis of a well-developed record consisting of affidavits, depositions and other documentary evidence, that (1) neither respondent "had knowledge of falsity, that neither entertained serious doubts as to the truth of any statement in the article, and that neither acted with reckless disregard of truth or falsity" and (2) that petitioner "has not produced a scintilla of proof supportive of a finding that either [respondent] in fact entertained serious doubts about the truth of a single sentence in the article"?

STATEMENT

This is a libel action brought by plaintiff, the Mayor of St. Louis, on the basis of an article published in defendant Time Inc.'s magazine Life accusing the Mayor of maintaining "business and personal ties with the gangsters that operate in his city." The article consists of 87 paragraphs. Despite the attack which the article made on his fitness for public office, plaintiff significantly complains of only four paragraphs, apparently hoping thereby to avoid both the thrust of the article and the other 83 paragraphs. For the convenience of the Court, we submit herewith copies of the article on which each paragraph is appropriately numbered and the four paragraphs of which plaintiff complains—*i.e.*, paragraphs 11, 12, 27, 31—are bracketed.

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*As described later, plaintiff complains of only four of the 87 paragraphs in the article. The refusal of the reporter to identify his sources relates only three of these four paragraphs, each of which was corroborated by documents furnished to plaintiff by defendants.

To put this case in its proper perspective it is appropriate to describe the thrust of the article by brief reference to various of the 83 paragraphs which plaintiff does not complain about and which, as the courts below noted, he either admitted or did not explicitly deny.

Plaintiff knows that organized crime flournishes in St. Louis (pars. 5-6). Yet, he has publicly denied the existence of organized crime in St. Louis, despite the activation of a special United States Government task force against organized crime in St. Louis (par. 1). Notwithstanding all of this, in January 1970 plaintiff appointed Morris Shenker, "the foremost lawyer for the Mob in the U. S." (par. 8), as head of his Commission on Crime and Law Enforcement (par. 2). Life's charge that the Mayor and his new crime commissioner had personal ties with the underworld is based upon plaintiff's uncontroverted dealings and his business and personal ties with Shenker and with plaintiff's friend and campaign manager, Anthony Sansone, the son-in-law of James Michaels, a notorious gang leader (pars. 10, 13-14, 15-26, 28-30, 87). The article details not only the tangled activities of Shenker (pars. 8, 35-87), but also shows how the Mayor was involved with Sansone (pars. 10, 14-22, 26, 28-30), and thus, in turn, with Michaels and Anthony Giardano, the St. Louis leader of the Cosa Nostra (pars. 10, 26, 32-34). Indeed, plaintiff admits in his own "book" entitled "The Mayor, The Magazine and the Truth", which he published after the Life article and has widely distributed in St. Louis, that Sansone "has been a close friend of mine for more than 20 years" and is a son-in-law of Jimmy Michaels (p. 48).

Any time that the mayor of a major city in this country which has organized crime has a friend and campaign manager who is the son-in-law of a gang leader in his city and appoints as Chairman of his Crime Commission the fore-

most lawyer for organized crime in the United States, he invites, without more, the article's label of "phony" or "two-faced" with respect to his crime fight in his city, particularly when he disclaims the existence of organized crime in his city and thus shields it from risk of action by his Crime Commission. The heart of the matter is that plaintiff has close ties with Sansone and Shenker—and Sansone and Shenker are closely tied with organized crime —and that is precisely what the article detailed and what plaintiff in the main admits. These are the "ties with gangsters" that plaintiff himself says is the thrust of the article. Against that central thrust of the article and the 83 paragraphs which plaintiff does not challenge, the four paragraphs which plaintiff does complain about are minor indeed, as the courts below noted.*

Moreover, as the courts below found, each of the four challenged paragraphs was corroborated by documents, the authenticity of which was unchallenged, so as to negate malice (see the opinion of the District Court at pp. A-21 through A-23 of the petition, and the opinion of the Court of Appeals at pp. A-9 and A-10 and A-13 through A-15). Thus, with respect to the statements in paragraphs 11 and 12 of the article defendant Walsh had information, substantiated by documents 10 and 12 described in Appendix D to this brief, that plaintiff met with Michaels and Sansone, the Mayor's campaign manager at Rite Way in December of 1964, and also that Sansone met with Michaels and Giardano, also at Rite Way, in March of 1964, to discuss

*The 83 paragraphs which plaintiff does not challenge spell out precisely the same unflattering conclusions about plaintiff that are contained in the four paragraphs he does challenge. As the District Court said, " . . . the four paragraphs complained of here have little or no impact on the total article. In context, the four paragraphs are a minute and relatively ineffective portion of the article as a whole." (Pet., p. A-23). See also the opinion of the Court of Appeals (Pet., pp. A-7, A-8).

the local election. The statement in paragraph 27 of the article that Michaels wrote insurance through plaintiff's insurance agency is substantiated by documents 3, 4 and 6. With respect to the last of the four challenged paragraphs, no. 31, plaintiff admittedly attended the funeral of Dorothy Michaels, which was also attended by the elite of the underworld (documents 19, 20, 21), and Walsh had information, substantiated by documents 20, 32, and 34, that plaintiff attended the funeral of another Michaels relative in January 1970 (which was not mentioned in the article) and attended the get-together at the Sansone home following Dorothy Michaels' funeral.

The careful editorial process followed by Life in the preparation and publication of the article was fully revealed in extensive pretrial discovery conducted by plaintiff. The article was initially written by defendant Walsh who did the basic investigative work for it. Thereafter, the article was rewritten by Life Senior Editor Russell Sackett and Life Associate Editor Thomas Flaherty, edited by Senior Editor Scot Leavitt, and Managing Editor Ralph Graves, and checked by Reporter Janice Pikey and Attorneys Gabriel Perle and Harry Johnston, and, with respect to the authentication of certain government documents, by Attorney William Hundley. The depositions of all of them were taken by plaintiff and reveal quite clearly that all those who had anything to do with the article believed in its truth. In addition, defendants produced all the documents, literally hundreds, which were utilized as source material for the article.

Defendants moved for summary judgment on the ground that plaintiff could not prove "actual malice" in the constitutional sense as required by the *New York Times* (376 U. S. 254) line of cases in this Court. Plaintiff opposed because defendant Walsh, who had fully disclosed all written material utilized in the preparation of the article

and the identity of most of the sources upon which he relied, refused to reveal the identity of some informants in the Department of Justice (Walsh feared they would lose their jobs and, also, feared that there was "danger of physical harm") who had supplied him with some of the reports and information used in the preparation of three of the four challenged paragraphs; plaintiff also moved to compel Walsh to reveal those sources.

The District Court granted summary judgment for defendants. It found from the extensive deposition and documentary evidence that "defendants had no knowledge of falsity, no serious doubt concerning the truth of any statement in the article, and certainly no reckless disregard of whether or not statements in the article were false" and that "Plaintiff has failed to produce or raise any issue as to actual malice on the part of the defendants". The District Court also found that defendant Walsh's refusal to reveal his sources "has no bearing on the malicious intent of the defendants *under the facts of this case*" (italics added). In the light of those findings the District Court concluded that it was not necessary to pass on plaintiff's motion to compel Walsh to disclose his sources. See pp. A-23 and A-24 of the petition.

The Court of Appeals affirmed. It concurred in the District Court's factual findings and conclusion that defendants were entitled to summary judgment as a matter of law. It likewise concluded, "on the facts of this particular case", that the District Court did not err in refusing to pass on plaintiff's motion to compel the disclosure of Walsh's sources because the facts clearly showed that defendants were entitled to summary judgment and that, "quite apart from the tactics employed in collecting data for the article", plaintiff could not prove "actual malice" (pp. A-9 and A-10 of the petition). And the Court of Appeals specifically left open the question whether, under other and diff-

erent circumstances, it might be in order to compel disclosure of news sources before summary judgment could be granted (pp. A-10, A-11 and A-13 through A-15 of the petition.)

ARGUMENT

(a) This case does not warrant review

The result below was correct and in accordance with the applicable decisions of this Court beginning with *New York Times.** There is no conflict of decisions. The courts below followed precisely the same legal doctrine as ruled upon by the Ninth Circuit in *Cerrito* v. *Time, Inc.*, 499 F. 2d 306 (9th Cir. 1971), *affirming* 302 F. Supp. 1071 (N. D. Cal. 1969). Those decisions, in turn, are completely consistent with like decisions by the Southern District of New York in *Konigsberg* v. *Time, Inc.*, 312 F. Supp. 848 (1970) and the Supreme Court of the State of New York in *Schwartz* v. *Time, Inc.*, unreported, No. 15937/1969, rendered March 1, 1972. A copy of the *Schwartz* opinion is attached hereto for the convenience of the Court as Appendix A. There are no contrary decisions, and there is simply nothing in this case warranting the attention of this Court, particularly since this case was decided on the basis of its particular facts, as to which concurrent findings were made by the two courts below, and the application of familiar concepts for summary judgment.

In essence, plaintiff is relying on a claim that defendants should not have had the information they had, neglect-

*We will be relying in this brief upon decisions in this Court in *New York Times* v. *Sullivan*, 376 U. S. 254, *Garrison* v. *Louisiana*, 379 U. S. 64, *Time, Inc.* v. *Hill*, 385 U. S. 374, *St. Amant* v. *Thompson*, 390 U. S. 727, *Greenbelt Pub. Assn.* v. *Bresler*, 398 U. S. 6, *Rosenbloom* v. *Metromedia, Inc.*, 403 U. S. 29, and *Branzburg* v. *Hayes*, 408 U. S. 665. For brevity, we shall refer to those decisions of this Court simply by identification of the case and the page number of the opinions upon which we rely.

ing the fact that the sole issue in a libel action of this kind is knowledge of falsity or serious doubts as to truth, and upon a claim of negligence. With respect to the first claim, the Court of Appeals correctly ruled as follows (pp. A-9 and A-10 of the petition):

> "... Nevertheless, on the facts of this particular case, we believe that in his preoccupation with the identity of Life's news sources, the mayor overlooked the central point involved in this appeal; that the depositions and other evidentiary materials comprising this record establish, without room for substantial argument, facts that entitled both defendants to judgment as a matter of law, *viz.*, that, quite apart from the tactics employed in collecting data for the article, the mayor has wholly failed to demonstrate with convincing clarity that either defendant acted with knowing or reckless disregard of the truth."

With respect to the claim of negligence, plaintiff disregards the fact that negligence cannot be equated with knowledge of falsity or serious doubts as to the truth, as repeatedly stated by this Court in *New York Times*, p. 288, *Garrison*, p. 79, *Hill*, p. 389, *St. Amant*, pp. 731-2 and *Metromedia*, pp. 50-1.*

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*Plaintiff's argument (Pet., pp. 22-25) that, because Life claims to have conducted a year-long investigation it should be held to a standard of reasonableness, is merely a rerun of his negligence argument. If, in fact, plaintiff doubts that Life conducted such an investigation, then it is this "falsehood" on which Life should be challenged. However, the length of Life's investigation is well documented and not in dispute, and plaintiff is thus left with the frivolous contention that whenever a publisher conducts a lengthy investigation of fact, his protection under the doctrine of *New York Times* v. *Sullivan* vanishes. It is hard to imagine a rule which would do more to deter responsible reporting.

(b) Application of constitutional protection

Plaintiff is Mayor of St. Louis and the article dealt with his connections with organized crime. Constitutional protection thus applies to the article both under the public official rule of *New York Times* and the public interest rule of *Metromedia.*

(c) Qualification for constitutional protection

The facts as to defendants' state of mind and activities are crystal clear and were examined in detail by both courts below. There patently was no knowledge of falsity or serious doubts as to truth, and that is the end of the case. We think these points are clear from a mere reading of the opinions below. However, as an aid to the Court, we annex hereto, as Appendix B, extracts from our brief below dealing with testimony as to the editorial process, as Appendix C, extracts from our brief below setting forth plaintiff's purported rebuttal proof and as Appendix D, a digest of 36 documents, culled from the hundreds of documents utilized by the Life editors and furnished to plaintiff, which suffice to show written material upon which the article was based. Those appendices set forth with more detail and precision the nature of the proof presented below with respect to falsity, knowledge of falsity and serious doubts as to truth. There can be no doubt, based thereon, that defendants qualified for constitutional protection and for summary judgment in their favor, as the courts below found after a careful, extensive and studied examination of the voluminous record.

(d) A failure to reveal all sources cannot bar the granting of summary judgment in this action

We recognize that if this case involved application of the principles enunciated by this Court in *Branzburg,* then

a question might be presented worthy of review. However, those constitutional questions were not reached in this case since it is not necessary to deal with them in granting summary judgment for defendants despite the lack of complete disclosure as to all sources. Contrary to plaintiff's argument (Pet., pp. 16-21), the decisions below do not hold that newsmen have a First Amendment privilege to withhold the identity of their sources. Instead, the courts below found it unnecessary to pass on the question of constitutional privilege because the facts of this case showed that defendants were entitled to summary judgment regardless of the failure to disclose some sources, and the same is true of the *Cerrito, Konigsberg* and *Schwartz* cases which follow the same principle as the instant case. Since these cases thus rest on factual determinations in the application of settled principles regarding summary judgment, rather than on a question of constitutional privilege for non-disclosure, they do not warrant review by this Court.

To elaborate, we have proceeded in these cases on a *corroboration* theory. If the facts supplied by the undisclosed sources are sufficiently corroborated by the facts supplied by disclosed sources so that a conclusive showing of good faith may be made, then the undisclosed sources need not be disclosed since their identity then becomes immaterial. In essence, while we believe that this is a case "where legitimate First Amendment interests require protection" (*Branzburg*, 408 U. S. p. 710), that issue is not reached under the facts in this case since proof of *corroboration* has been presented which makes the undisclosed sources irrelevant, irrespective of the constitutional protection for newsgathering.

The Court of Appeals below agreed with this theory and stated (pp. A-14 and A-15 of the petition—footnotes omitted):

> ". . . Where, as here, the published materials, objectively considered in the light of all the evidence, must be taken as having been published in good faith, without actual malice and on the basis of careful verification efforts, that is, they were published in good faith without regard to the identity of the news sources, there is no rule of law or policy consideration of which we are aware that counsels compulsory revelation of news sources. Neither is there any evidence by which a jury could reasonably find liability under the constitutionally required instructions. When these factors conjoin, the proper disposition is to grant the defense motion for summary judgment. . . ."

In so far as the Court of Appeals thought it necessary to advert to the *Branzburg* principles, they are discussed in the footnotes on pages A-11 and A-15 of the petition as follows:

> "Indeed, as the Court observed in *Caldwell*, n. 9, *supra*, 'without some protection for seeking out the news, freedom of the press could be eviscerated.' 40 U. S. L. W., at 5030. Similarly, to compel a newsman to breach a confidential relationship merely because a libel suit has been filed against him would seem inevitably to lead to an excessive restraint on the scope of legitimate newsgathering activity."
>
> "*Caldwell* makes clear that harassment of the press undertaken not for legitimate reasons is without justification. 40 U. S. L. W., at 5038; at 5039 (opinion of Powell, J). To compel disclosure under

the circumstances shown by this record would seem to constitute precisely the harassment *Caldwell* seeks to curb."

We submit that the theory which we have been following flows inevitably from the decisions of this Court in *New York Times* and its progeny and, since it has been unanimously approved by both the Ninth and Eighth Circuits, need not be reviewed by this Court.* We may mention that the theory was evolved in an effort to enable Life magazine to accede to the pleas of two Presidents, Presidents Johnson and Nixon, that the press report to the American people on organized crime. President Johnson's plea appears in the Challenge of Crime in a Free Society: A Report by the President's Commission on Law Enforcement and Administration of Justice, p. 208, issued in February, 1967. President Nixon's plea is contained in his message to Congress of April 23, 1969 (115 Cong. Rec. H 2949-2951). Life's editorial process has been carefully geared to meet that objective and to conform to the theories expressed by this Court in *New York Times* and its progeny. Since both the Ninth and Eighth Circuits, as well as the Southern District of New York and the Supreme Court of New York, are unanimous in approving that editorial process, there is nothing that this Court need review at this time, unless

*In addition to the lack of conflict, it should be emphasized that this case is a singularly inappropriate one for review by this Court. As previously stated, the court below did not hold that compulsory disclosure of sources may never be required before granting summary judgment. Instead, it held that on the facts of this case disclosure was not warranted, and it left open the question of whether, under different facts, it might be in order to require disclosure before summary judgment could be granted. Since that result rests on the concurrent findings of the facts by both courts below, "a very obvious and exceptional showing of error" must be made to warrant this Court's attention, *Graver Mfg. Co.* v. *Linde Co.*, 336 U. S. 271, 275; *Berenyi* v. *Immigration Director*, 385 U. S. 630, 635. There is simply no such error here.

and until there should evolve a conflict in the circuits. We think the correctness of the view expressed by those courts is sufficiently clear that there is little chance that there will be a conflict in the future.*

The course we suggest is consistent with action taken by this Court in refusing to review the granting of summary judgment in other First Amendment libel cases** presumably on the ground that the Federal Circuit and state courts had correctly and with unanimity performed their proper house cleaning function, in accordance with the clear indications concerning the deterrent effect on the freedom of the press of unwarranted exposure to libel trials as set forth in the decisions of this Court, *New York Times*, p. 279; *Hill*, p. 389; *Metromedia*, pp. 52-3. That same course should be followed here, particularly in view of the facts of this case and the concurrent findings of both courts below.

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*_Garland_ v. _Torre_, 259 F. 2d 545 (2d Cir. 1958), relied on by plaintiff in his attempt to create the mirage of a conflict between circuits is easily distinguished from this case. Unlike the defendants in the instant action, the defendant in *Garland* could offer no corroborative support for her assertions. Life, by contrast, had substantial evidence independent of the identity of Walsh's sources to support the truth of the statements contained in its article. That no conflict between the Circuits currently exists is made abundantly clear by a comparison of *Konigsberg* (S. D. N. Y.), *Schwartz* (New York State) and *Cerrito* (9th Circuit) with the opinion of the Eighth Circuit in this case.

**_Washington Post Co._ v. _Keogh_, 385 U. S. 1001; _Thompson_ v. _Evening Star Newspaper Co._, 393 U. S. 884; _Tagawa_ v. _Maui Publishing Co._, 396 U. S. 822; _United Medical_ v. _Columbia Broadcasting System_, 394 U. S. 921; _Time, Inc._ v. _McLaney_, 395 U. S. 922; _Sellers_ v. _Time, Inc._, 400 U. S. 830.

CONCLUSION

For the reasons stated, the petition does not present any questions warranting review by the Court and should be denied.

December 1, 1972.

Respectfully submitted,

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APPENDIX A

SUPREME COURT

NEW YORK COUNTY

SPECIAL TERM—PART I

MARTIN (RED) SCHWARTZ,
Plaintiff,

—against—

TIME INC., THE NEW YORK TIMES CO. and SANDY SMITH,
Defendants.

15937/1969

CULKIN, J.:

This is an action for libel. Plaintiff seeks $1,000,000 damages by reason of an article appearing in Life Magazine. Defendant Time Inc. and defendant Sandy Smith, in companion motions, move for summary judgment pursuant to CPLR 3212. Plaintiff Martin "Red" Schwartz makes a cross motion for an order pursuant to CPLR 3124 compelling defendant Sandy Smith to answer certain questions propounded to him during his examination before trial and upon his failure to answer said questions to strike his answer pursuant to CPLR 3126.

The Life article of which complaint is made appeared in the June 20, 1969 issue of that magazine and dealt with the then front page story of Joe Namath's resignation from organized football following a directive by Football Commissioner Peter Rozelle that Namath give up his interest in his nightclub Bachelors III, since it was frequented by "undesirables". After giving the background of the controversy, the article went on to detail that there were at least thirteen "hoods" and "undesirables" who frequented the

club including three Cosa Nostra members, two thieves, two drug dealers and six gamblers, including plaintiff Schwartz, who were characterized as being "unsavory". The plaintiff was named with five other men as being "gamblers, principally lottery operators and bookies." The first cause of action is based on the article itself and the second and third causes of action upon quotations from the article in New York and Los Angeles newspapers. The fourth cause of action is directed against the New York Times.

Defendants' position is that Smith's characterizations of the plaintiff as published by Time Inc. are protected by the First Amendment to the United States Constitution, unless plaintiff can demonstrate "actual malice". They contend that Smith's refusal to disclose sources cannot bar the granting of summary judgment which is mandated by constitutional principles.

Plaintiff argues that he has raised an overriding issue of fact which warrants the denial of defendants' motions for summary judgment. That issue of fact is whether defendants did act with "actual malice" in publishing untrue statements with respect to the plaintiff. Plaintiff contends that he will be able to prove, with convincing clarity, at trial, that defendants Smith and Time Inc. acted with reckless disregard for the truth. He asks that defendants' motions for summary judgment be denied and plaintiff's cross motion for an order compelling the defendant Smith to reveal his sources of information should be granted.

There can no longer be any doubt that the publication of which this action complains falls within the scope of the privilege afforded by the First Amendment. Under that privilege, first enunciated in *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), a publisher is protected

with respect to publications concerning matters of "public interest". The court held, there, that publications involving the activities of persons holding public office were constitutionally protected. While *New York Times* happened to involve the case of a public official, the rationale for the privilege was clearly broad enough to justify its extension to all matters of general or public concern. The concepts of "public official" and "public figure" are but one facet of, and are comprehended within, the concept of "public interest" as expressed by the explicit language of the Supreme Court in *New York Times Co.* v. *Sullivan, supra,* at page 269; *Garrison* v. *Louisiana,* 379 U. S. 64, 74-75 (1964); *Rosenblatt* v. *Baer,* 383 U. S. 75, 84-86 (1966); *Time, Inc.* v. *Hill,* 385 U. S. 374, 387-388 (1967); *Curtis Publishing Co.* v. *Butts,* 388 U. S. 130, 150-152 (1967), and *St. Amant* v. *Thompson,* 390 U. S. 727, 731-732 (1968).

It became apparent that legitimate public interest in the subject matter of the publication, rather than the identity of the plaintiff, was the proper focus of the constitutional inquiry. Numerous court of appeals have explicitly so held. *United Medical Laboratories* v. *C. B. S.,* 404 F. 2d 706 (9th Circuit 1968), *cert. denied* 394 U. S. 921 (1969); *Time, Inc.* v. *McLaney,* 406 F. 2d 565 (5th Circuit 1969), *cert. denied,* 395 U. S. 922 (1969). Finally, in *Rosenbloom* v. *Metromedia, Inc.,* 403 U. S. 29, the Supreme Court expressly adopted the "public interest" test for defamation. Thus, it is now settled that the constitutional privileges announced in *New York Times* apply to all publications regarding matters as to which the public has the right to be informed.

New York courts also held, even before *Rosenbloom,* that communications involving matters of public concern must fall within the protection of the *New York Times*

privilege. *Garfinkel* v. *Twenty-First Century Publ. Co.*, 30 A D 2d 787, 291 N. Y. S. 2d 735 (1st Dept. 1968); *All Diet Food Distributors Inc.* v. *Time, Inc.*, 56 Misc 2d 821, 290 N. Y. S. 2d 445 (1967); *Fotochrome, Inc.* v. *New York Herald Tribune*, 61 Misc 2d 226, 305 N. Y. S. 2d 168 (1969).

The activities of organized crime, which is what is involved in this case, is clearly such a matter of public concern and interest. The pervasive influence of criminal organizations is constantly in the public mind and has been a major issue in recent years. As a result the mantle of constitutional protection covers the article upon which this suit is brought.

The Supreme Court has laid down the following constitutional standards for publications entitled to protection: a plaintiff may not recover unless he proves with "convincing clarity" that the article was published "with 'actual malice' —that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times*, 376 U. S. at 280. It is for the courts to determine whether this standard has been met. They must examine the statements in issue and the circumstances under which they were made, to ascertain whether the proof presented to show "actual malice" has "the convincing clarity which the constitutional standard demands. . . ." (Id. at pp. 285-86). These principles, enunciated in *New York Times* and repeated in *Garrison* v. *Louisiana*, 379 U. S. at 74, have remained constant as the Supreme Court has extended the doctrine of *New York Times* to articles involving public figures and matters of public interest. In *St. Amant* v. *Thompson*, 390 U. S. 727 (1968), the Court explained that:

> "These cases are clear that reckless conduct is not measured by whether a reasonably prudent man

would have published or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice." 390 U. S. at p. 731.

The burden of proving actual malice is on the plaintiff, *Cepeda* v. *Cowles Magazines & Broadcasting, Inc.*, 392 F. 2d 417 (9th Cir. 1968) *cert. denied*, 393 U. S. 840 (1968), who must make an affirmative showing of facts from which defendants' probable knowledge of constitutional falsity may be constitutionally sustained. *Thompson* v. *Evening Star Newspaper Co.*, 394 F. 2d 774, 776 (D. C. Cir.), *cert. denied*, 393 U. S. 884 (1968). The mere hope of questioning the credibility of defendants' witnesses is not sufficient to resist summary judgment. *Hurley* v. *Northwest Publications, Inc.*, 273 F. Supp. 967, 974 (D. Minn. 1967), *aff'd on opinion below*, 398 F. 2d 346 (8th Cir. 1968). Further, "actual malice" may not be presumed or inferred from the nature of the defamatory statement, *New York Times* v. *Sullivan*, 376 U. S. at p. 273. Neither may it be inferred from the failure to seek out plaintiff to verify the facts before publication, *Hurley* v. *Northwest Publications, Inc.*, *supra*.

The facts of this case reveal reasonable care in the research and preparation of the article. The depositions of the employees of Time, Inc. show the editorial process by which this article was prepared. Defendant Time, Inc. reasonably relied upon a careful investigation by a knowledgeable, experienced crime reporter whose reputation for

integrity is impeccable. The plaintiff has not offered evidence that suggests to this court that Smith or Life Magazine had any reason whatsoever to doubt that the matters reported were true. It is not enough for plaintiff to try and show that defendants could have investigated more. Negligence cannot be equated with knowledge or serious doubt. Also, plaintiff's contentions as to the falsity of the article do not bear upon proof of knowledge of falsity. The record clearly indicates that plaintiff is unable as a matter of law to discharge the burden imposed on him of showing defendants' knowledge of falsity.

The necessary constitutional corollary to the constitutional test and its application is that summary judgment must be granted as soon as it becomes clear that plaintiff cannot establish "actual malice". In *Dombrowski* v. *Pfister,* 380 U. S. 479, 487 (1965), the court made clear that it is necessary that frivolous libel suits be dismissed summarily to avoid the "chilling effect" on freedom of speech and press that an expensive defense entails. In *Washington Post Co.* v. *Keogh,* 365 F. 2d 965, 968 (D. C. Cir. 1966), *cert. denied,* 385 U. S. 1011 (1967), the court held that the defendant was entitled to summary judgment, stating that summary judgment was an essential part of the rules developed to ensure the First Amendment guaranty of freedom of press. The *Keogh* reasoning has since been followed by a multitude of First Amendment cases which have granted summary judgment in applying constitutional principles. *Hurley* v. *Northwest Publications,* 273 F. Supp. 967 (D. Minn. 1967), *aff'd on opinion below,* 398 F. 2d 346 (8th Cir. 1968); *Thompson* v. *Evening Star,* 394 F. 2d 774 (D. C. Cir.), *cert. denied,* 393 U. S. 884 (1968); *Time, Inc.* v. *McLaney,* 406 F. 2d 565 (5th Cir.) *cert. denied,* 395 U. S. 922 (1969); *Bon Air Motel, Inc.* v. *Time, Inc.,*

295 F. Supp. 704 (S. D. Ga. 1969); *aff'd* 426 F. 2d 858 (5th Cir. 1970).

The reasoning in the above cases is fully accepted by the courts of the State of New York. *Cohen* v. *New York Herald Tribune,* 63 Misc 2d 87 (Sup. Ct. Kings Co. 1970); *Droner* v. *Schapp,* 34 A D 2d 823 (2nd Dept. 1970); *Lloyds* v. *United Press Int.,* 63 Misc 2d 421 (Sup. Ct. New York Co. 1970); *Silbowitz* v. *Lepper,* 32 A D 2d 520 (1st Dept. 1969); *Pauling* v. *National Review,* 22 N Y 2d 818 (1968); *Gilberg* v. *Goffi,* 21 A D 2d 517 (2nd Dept. 1964) *aff'd no opinion,* 15 N Y 2d 1023 (1965); *Frink* v. *McEldowney,* 29 N Y 2d 720 (1971).

Moreover, failure by a defendant to disclose the identity of all its sources will not bar the granting of summary judgment, at least with respect to articles dealing with subjects of vital public interest, such as organized crime, provided sufficient other proof and sources are disclosed to satisfy a court of the defendant's good faith. *Cerrito* v. *Time, Inc.,* 302 F. Supp. 1071 (N. D. Calif. 1969); *aff'd* 449 F. 2d 306 (9th Cir. 1971); *Konigsberg* v. *Time, Inc.,* 312 F. Supp. 848 (S. D. N. Y. 1970); *Cervantes* v. *Time Inc.,* 330 F. Supp. 936 (E. D. Mo. 1971).

Here, defendant Smith has not revealed his sources for valid reasons. A disclosure of names would involve a material threat of mob reprisals against these informants. Moreover, disclosure would tend inevitably to cut off Smith's access to these and other informants, at once destroying his capacity as a reporter in an area of critical importance to the public and depriving him and the public of the fundamental right of access to the news under the First Amendment. Defendants rightfully contend that the identity of

Smith's informants is not material to the primary issue of whether Life's actions in printing the statement concerning plaintiff was malicious and was made with reckless disregard of the truth. The defendant Time, Inc. reasonably relied on Smith's reputation and the review of its editorial staff in reaching the conclusion that the allegations made were substantially true. Plaintiff has failed to present evidence which would lead this court to conclude that Time's asserted failure in requiring defendant Smith to disclose the identity of his sources was motivated by malice or reckless disregard.

Accordingly, the defendants' motions for summary judgment are granted.

Plaintiff's motion to compel Smith to reveal his sources is accordingly denied. Settle order.

Dated: March 1, 1972.

GERALD P. CULKIN
J. S. C.

APPENDIX B

These principles are set forth to illustrate the outer boundaries of the actual malice standard. The facts of this case reveal exemplary care in the research and preparation of the article. The uncontradicted depositions of defendant Time, Inc.'s employees show the thorough nature of the investigation which was conducted. Viewed against a standard which requires only that the publisher be free from actual serious doubts as to truth, this showing clearly forecloses any hope of plaintiff's recovery.* There was no doubt whatever in the minds of defendant Time, Inc.'s employees as to the truth of the facts stated in the article.

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*Plaintiff adverts to the distinction which has been noted in some early decisions of the difference between "hot" news and projects of a more extended nature (although the degree of extension for constitutional purposes was not defined and is illusive), much as reference was made in earlier cases to public officials, public figures, the degree of anonymity of the plaintiff and the ability on the part of the plaintiff to respond. We think that such a distinction has been abandoned, much as public officials, public figures, degree of anonymity and ability to respond were explicitly abandoned as a basis of decision in *Metromedia*. As stated in *Winters* v. *New York*, 333 U. S. 507, 510 (1948): "The line between the informing and the entertaining is too illusive for the protection of that basic right."

Plaintiff fails to note that the *Butts* case on which he relies was decided on June 12, 1967. On November 6, 1967, decision was rendered in *Beckley Newspapers* v. *Hanks*, 389 U. S. 81, in which there was no investigation whatsoever. On April 29, 1968, decision was rendered in *St. Amant* v. *Thompson*, 390 U. S. 727, in which "reckless disregard" was defined as "serious doubts as to truth" (p. 731). And in both *St. Amant* (pp. 731-2) and *Metromedia* (pp. 50-1) the Court stressed that a negligence standard could not apply. The sole test, then, whatever the character of the "public interest" communication, is knowledge of falsity or serious doubts as to truth.

However, the distinction is immaterial here since defendants' investigation was patently painstaking and thorough, so much so in fact that plaintiff, whose integrity we question, can complain solely of four out of 87 paragraphs. But the remaining 83 paragraphs patently spell out the precise unflattering conclusions as to plaintiff that may be reached from the four.

Appendix B

Let's start with the basic facts of which plaintiff does not complain, *i.e.*, (1) plaintiff was a close personal friend for over twenty years of his campaign manager Sansone; (2) Sansone is the son-in-law of top St. Louis gangster James Anthony Michaels, Sr.; (3) Shenker is the leading spokesman for organized crime in this country; (4) plaintiff appointed Shenker to head both his "subsystem" on crime and his Commission on Crime; (5) in publicity concerning the Crime Commission and the "subsystem" on crime, no mention was made of organized crime; (6) plaintiff publicly denied the existence of organized crime in St. Louis; and (7) the United States Government proclaimed the existence of organized crime in St. Louis and sent a special task force to St. Louis one month prior to the article for the purpose of dealing with organized crime—presumably because plaintiff had effectively ensured that St. Louis itself could not and would not deal with it.

Once that showing is made on facts of which no complaint is made the labels "Phony Crime Fight" and "Two-Faced Crime Fight" fit like a glove. All that is thus needed for defendants' case is corroboration in which they, in good faith, believed. Contrary to plaintiff's apparent contention defendants *are not* obligated to prove plaintiff guilty beyond a reasonable doubt—it is plaintiff who must show himself not guilty *and* prove malice with convincing clarity.

We believe that this matter of "corroboration" is the key to present *New York Times* cases on actual knowledge of falsity or serious doubts as to truth (*that concept is vital to the entire summary judgment doctrine—for that reason, we here emphasize its import*). The reference to the December 1964 Rite Way meeting of plaintiff, Sansone and Michaels, the March 1965 Rite Way meeting of Sansone, Michaels and Giardano, and the June 1967 "get-

together" at the Sansone home with the elite of the underworld are all helpful in evaluation of plaintiff's action in appointing Shenker. But none would ever have been reported by Life absent corroboration. Those three meetings were referred to against a background of (1) the facts which establish that plaintiff's appointment of Shenker as head of the Commission on Crime was "phony" and "two-faced", (2) copies of genuine Department of Justice documents which evidenced the existence of those meetings and (3) a host of other facts concerning the Sansone-Cervantes, Sansone-Michaels, Sansone-Giardano, Shenker-Giardano and Shenker-Cervantes relationships. The necessary corroboration is there. That is the end of the constitutional case and plaintiff, constitutionally, cannot prevail since this is not, as pointed out by the Supreme Court in *St. Amant,* the case of an anonymous informer. It is much more and the necessary corroboration has been established. What more does one need? Once good faith is established independently of the nondisclosed souces, that is the end of the matter constitutionally. If Walsh had not the facts which established the "phony crime fight", the documents and the host of other facts concerning the Cervantes-Shenker-Sansone-Michaels-Giardano relationships. he might be obligated to disclose (we will deal with that case when it appears, if ever)—but with them he clearly is not obligated for purposes of this action.

Let us turn to plaintiff's personal and business ties with the underworld. First, his ties with Shenker and Shenker's ties with the underworld are set forth in the portions of the article of which no complaint is made (see also doc. 35). Secondly, his ties with Sansone are admitted. Sansone, in turn, had a personal and business relationship with his father-in-law (whose criminal career is graph-

ically described in doc. 2) which was described by Walsh at his deposition (App. p. 126; Dep. pp. 238-9) and which is substantiated by docs. 5, 6, 8, 9, 10, 11, 12, 13, 14, 15, 20, 28. Sansone also deals with Giardano (as substantiated by docs. 12, 14, 16, 21, 27, 28) and Giardano is the head of one of two Missouri Cosa Nostra families as described in Life of September 1, 1967 (doc. 22), which was checked by Life's committee of experts (see *Cerrito* decision, *infra,* p. 27). Sansone also invested money ($150,000) in The Frontier in Las Vegas (doc. 24) which was "owned by the 'Outfit' " (doc. 23).

We think we could stop with that proof as evincing the basis of defendants' good faith and be entitled to summary judgment. But there is more. The fact that Michaels wrote insurance through plaintiff's insurance agency is substantiated by docs. 3, 4, 6. The mayor's ownership of Mound City Tobacco Company, which sells to the underworld, is not complained of. Likewise, the fact that the President of Mound City guaranteed a loan to Giardano by a company of which plaintiff was an officer is substantiated by doc. 7, and no complaint is made of that fact.

Plaintiff admittedly attended the funeral of Dorothy Michaels, which was also attended by the elite of the underworld (docs. 19, 20, 21), and Walsh had information, substantiated by docs. 20, 32 and 34, that plaintiff attended the funeral of another Michaels relative in January 1970 (which was not mentioned in the article) and attended the get-together at the Sansone home following Dorothy Michaels' funeral.* Walsh also had information, substantiated by

*Interestingly enough, plaintiff does not dispute the presence of the elite of the underworld at Sansone's home following Dorothy Michaels' funeral in June 1967—he only disputes his presence there. But where does that leave plaintiff's good friend Sansone? And plaintiff admits he attended the funeral—at which the elite of the underworld were also present. St. Louis should be proud of him.

docs. 12 and 13, that plaintiff met with Michaels at Rite Way (a corporation formed by Shenker—doc. 1) in December 1964 and at the opening of a restaurant in May 1966, the latter fact not having been mentioned in the article.

In the face of that proof we add that Walsh talked to people at the Department of Justice who assured him that his information regarding the December 1964 Rite Way meeting, the March 1965 Rite Way meeting and the June 1967 Sansone get-together was true and correct. But defendants' case is complete without that check since Walsh had sufficient without that check upon which to base a good faith belief in the truth of that which he wrote. For that reason, the disclosure of sources, which plaintiff here seeks, is irrelevant to this action. To hold otherwise would penalize that investigation—for Walsh could have omitted that re-check and still be entitled to publish on the basis of that which he had. *Cf. Beckley Newspapers Corp.* v. *Hanks*, 389 U. S. 81 (1967), in which there was no investigation whatsoever and yet the defendant was protected by the Constitution.

We submit that we have demonstrated beyond peradventure of a doubt the credibility of defendant Time, Inc.'s employees, including defendant Walsh, in stating under oath that they believed in the truth of the article at the time of publication and still believe in the truth of the article.

And just what has plaintiff done to establish actual knowledge of falsity or serious doubts as to truth with convincing clarity? He has been given hundreds of documents utilized in connection with the preparation of the article. He has deposed over a five-day period Walsh, Pikey, Johnston, Flaherty, Graves, Perle, Leavitt, Hundley, Sackett and Friedman, constituting each and every person who had anything to do with the truth or falsity of the article.

Appendix B

There is not one whisper of a fact that will bear on proof essential for plaintiff's case. Each and every person has affirmed his or her belief in the truth of the article, with the exception of Hundley who merely authenticated the genuineness of the Government documents and did not purport to pass on truth or falsity, and each and every person has shown that there was good reason for that belief.

Plaintiff apparently, and mistakenly, believes that a showing that defendants could have investigated more and could have phrased portions of the article differently suffices to show actual knowledge of falsity or serious doubts as to truth. But even assuming that plaintiff has made such a showing (which is not the case), negligence cannot be equated with knowledge or serious doubt. The Supreme Court has made it quite clear that no such equation will be tolerated: *New York Times* (376 U. S. at p. 288); *Garrison* (379 U. S. at p. 79); *Hill* (385 U. S. at p. 389); *St. Amant* (390 U. S. at pp. 731-2); *Metromedia* (403 U. S. at pp. 50-1).

Let's examine plaintiff's approach in specifics. One of the matters of which plaintiff complains is the statement in the article (doc. 27) that "mobster Jimmy Michaels himself wrote insurance through Cervantes' firm until 1962". Plaintiff agrees that Michaels is a mobster, as indeed he must. Plaintiff disputes the remainder. Those words were based on notes made by Research Pikey in Jefferson City in January 1970 at the Missouri Division of Insurance (docs. 3, 4). Doc. 3 recorded Michaels' renewal application for an insurance broker's license on April 11, 1962, which listed the Cervantes firm as one of Michaels' agencies. Doc. 4 recorded a letter of the Insurance Division to the Cervantes agency of April 20, 1962, which set forth that, "This applicant has stated he has brokered business through your agency in the

past twelve months," as well as the devious and unresponsive reply of the Cervantes agency that, "We have nothing for this man at present. Understand that he wants to broker business with us."

Walsh and Pikey gave those documents, as they appeared in Pikey's notes, as the basis for the statement in the article and their belief in the truth of the statement, and Johnston, Perle, Flaherty, Sackett and Leavitt gave Walsh and Pikey's oral description of those documents from Pikey's notes as the basis for their belief in the truth of the statement in the article. While the application did not in so many words state that Michaels had actually brokered business, aside from the inference to that effect from the instruction to list the license with the Cervantes agency, the Division of Insurance in writing to the Cervantes agency obviously based its letter either on that interpretation of the application and instruction or on a direct statement made by Michaels to it in the course of the investigation of Michaels that the Division of Insurance was then conducting and of which Pikey had been informed (Dep. pp. 57, 86, 90). Based on the Division of Insurance letter the Life editorial personnel were entitled to treat the letter either as the Division of Insurance interpretation of the application and instruction or as a Division of Insurance assertion of that which had been stated by Michaels. Under either theory the result was the same—an assertion by Michaels that he had brokered business through the Cervantes agency. What possible motive would Michaels have to lie under those circumstances?

Plaintiff's counsel spent literally hours with each and every witness (except Hundley and Friedman) emphasizing that the application made no such explicit statement. But since the Missouri Division of Insurance, the author-

ity having jurisdiction over such matters, had either itself so interpreted the application and instruction or had received a direct statement from Michaels during the course of its investigation of him, such proof does not in the slightest negate defendants' belief in the truth of the statement in the article based on the Michaels application and instruction, the Division of Insurance letter reporting Michaels' statement and the Cervantes agency evasive reply.

That plaintiff cannot be permitted to predicate a finding of knowledge of falsity or serious doubts as to truth upon defendants' interpretation of the insurance documents is additionally established by the Supreme Court in *Time, Inc.* v. *Pape,* 401 U. S. 279 (1971). The Court there specifically refused to allow "the adoption of one of a number of possible rational interpretations of a document that bristled with ambiguities" to be made the basis for a findings of "actual malice", and stated:

> ". . . The deliberate choice of such an interpretation, although arguably reflecting a misconception, was not enough to create a jury issue of 'malice' under *New York Times.*" 401 U. S. at 290.

Plaintiff's counsel also spent hours with respect to the statements in the article (pars. 11, 12, 31) concerning the December 1964 and March 1965 Rite Way meetings and the June 1967 gathering at Sansone's home following the funeral of Michaels' wife. But the inescapable fact is that those three meetings were dealt with specifically in Government memoranda (docs. 10, 11, 12, 13, 19, 20, 21), relied on by Walsh (as anyone else would do) described by Walsh to the other Life personnel and whose genuineness was authenticated by Hundley. No amount of cross-examination can eradicate those obvious and conclusive facts. *Time, Inc.* v. *Pape, supra.*

We say then that plaintiff has not presented one shred of evidence to challenge the validity of defendants' motion for summery judgment. An extensive and prolonged cross-examination based on pre-New York Times libel concepts can not possibly establish the truth of knowledge of falsity or serious doubts as to truth.

Facts gathered by Walsh over a period of many months were checked, analyzed, tested and evaluated by seven separate persons including one researcher, four editors and three attorneys over a period of many weeks. If that process has not demonstrated a valid and honest belief in that which was published about a public official who, on facts which are not disputed, instituted a "Phony Crime Fight", then the lesson of *New York Times* and its progeny has not been learned—and it will be impossible to report on organized crime which is menacing the nation.

APPENDIX C

A. Defendants have made a conclusive showing of good faith which has not been rebutted.

We use the term "good faith" as a convenient shorthand to indicate a showing that defendants had no knowledge of falsity (*New York Times*) or serious doubts as to truth [*St. Amant* v. *Thompson*, 390 U. S. 727 (1968)]. The Supreme Court has also phrased the matter that way. Thus, in *New York Times* the Court explicitly stated: "A defense for erroneous statements honestly made is no less essential here" (376 U. S. p. 278) and barred action on such statements "believed to be true" (*id.*, p. 279). Again, in *Garrison* v. *Louisiana*, 379 U. S. 64 (1964), the Court stated that: "Utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth" (p. 73). The record is bare of any indications whatsoever by plaintiff of an ability to demonstrate the contrary "with convincing clarity" (*New York Times*).

And what is plaintiff's proof? It does not bear upon defendants' mental state, which is the issue here, but solely upon truth—as to which also plaintiff is the loser and as to which he also bears the burden of proving falsity with convincing clarity (*Garrison*, 379 U. S. p. 74), or else he is out of Court.

1. The damning affidavits

Plaintiff and his friend Sansone finally, when forced, presented affidavits (App, pp. 506-14). They speak for themselves—their effect is complete proof of callous indifference and blindness to integrity that is simply unbelievable. Apparently it is now quite correct for the Mayor of one of our country's major cities and his friend and campaign manager openly to associate with the criminal underworld. Let's look at those affidavits, starting with friend Sansone.

Sansone now admits that "over the years I have been in Mr. Michaels' company" (usually in connection with "family" functions) and that "on occasions I have stopped at his place of business." Why? His incredible explanation is that it was "to drop off a gift from my wife or a cake or particular dish that she has made." He has known Giardano for 20 years and admits that he was together with Giardano and Michaels in March 1965 at the Rite Way Cigarette Company (confirmed in the Schaaf affidavit). He admits having dinner with Giardano and Michaels. He does not deny the December 1964 meeting at Rite Way, although he does deny that he "took" plaintiff there or "brought together" plaintiff and Michaels. He does not deny that they got together in his presence (no doubt to discuss cakes and pastry). Significantly, he makes no reference whatsoever to the facts disclosed in docs. 6, 8, 9, 13, 15, 16, 23, 24 and 28 concerning his activities or matters dealt with in the article.

Plaintiff himself does not deny that he met with Michaels at Rite Way Cigarette Sales in December 1964 although he does say that he was not at "the offices" of Rite Way. He admits that "over the years, on a very few occasions I have seen Mr. James Michaels." He confirms that Giardano was granted a loan by Lindell Trust Company while he was a member of the Board. He admits that he was part owner and Vice President of Mound City Tobacco Company and that it sold to the vending machine companies. He lamely explains his appointment of Shenker as head of the Crime Commission "because I thought it would be good for St. Louis" (—he doesn't say why he thought it would be good—or for whom else he thought it would be good). Just like Sansone, he significantly makes no mention whatsoever of other matters dealt with in the article.

No affidavits are presented by Shenker, Michaels or Giardano. No effort is made to answer the serious questions raised by the article about plaintiff's "Phony Crime Fight." It apparently suffices for plaintiff and Sansone to state blandly that they have not sinned—while admitting a more than casual acquaintance with organized crime. We repeat —the affidavits speak for themselves, but in favor of defendants. At best these affidavits go to the first element of proof, namely, truth. They have nothing whatever to do with the second necessary element that plaintiff must, but cannot, prove, namely, knowledge of falsity or serious doubts as to truth.

2. The insurance quibble

That which was covered *ad nauseam* on cross-examination of defendants' witnesses is now repeated. But nothing can gainsay the unambiguous language of the Stegeman letter ("The applicant has stated that he has brokered business through your agency in the past 12 months") against the background of the filing of Michaels' license with the Cervantes agency and the evasive reply of Heckman. Life relied on this evidence—who wouldn't (Walsh Dep. pp. 138, 156, 418, 423)? Neither Clay nor Stegeman denies that Michaels said he had brokered with the Cervantes agency and neither assert any personal knowledge about his dealings with the agency. They do not deal with that plain statement but instead make an unconvincing attempt to "construe" the evasive Heckman reply as stating that no insurance had been written. The clearest possible answer to that contention was given by Janice Pikey in her deposition (App. p. 229; Dep. pp. 84-5):

> "Q. What would Mr. Heckman have had to say in your mind, in your opinion, in order to inform Mr. Stegeman that Michaels had not written any insurance through the Cervantes firm?
>
> "A. Perhaps just that."

The matter of the Bland transcript of Insurance (Clay, Stegeman and Heckman affidavits) is no more than another quibble. When Pikey reported to Walsh upon her return to New York that it might be a Cervantes agency transcript, Walsh pointed out the error and stated that he already knew that it was a Bland transcript (Pikey Dep. p. 28; App. p. 210).

Whatever the facts might be as to Michaels' writing insurance through the Cervantes agency—certainly a minor cog in the story—there is no possible doubt that defendants believed, and with good reason, in the truth of the statement.

3. The funeral party

Bauman, the purported professional journalist, did not have the courage, for reasons best known to him, to report the facts that the people of St. Louis should have known about plaintiff. He conveniently omits from his affidavit the fact that another Globe reporter procured corroboration of Walsh's story (Walsh Dep. pp. 100-102; App. pp. 55-6). He also omits the fact that he himself had doubted plaintiff's credibility when he telephoned Sansone and that Sansone agreed: "You have no choice. I guess you have to go with it" (plaintiff's exhibit 1-D pp. 6, 7).* Bauman apparently ignores the fact that plaintiff attended the funeral, also attended by the leaders of the underworld, as being of no significance. His reference to Musial must be discounted by the fact that Musial was described as an acquaintance of ten years' standing in Michaels' original application for insurance! Moreover, Walsh had related the entire incident to Sackett, who cor-

*It is interesting to note that Bauman didn't even rise to Sansone's standards of responsible reporting.

rectly concluded that Bauman had been clearly wrong in his decision.

Plaintiff makes much of the fact that both he and Sansone denied that plaintiff attended the get-together. The answer here is that defendants simply did not trust their credibility, and for good reason. Sansone moved from a denial that members of the underworld had been at the affair to an admission that they had, and argued the innocence of the Mayor's presence while insisting that he wasn't there (plaintiff's exhibit 1-D pp. 3, 4). This understandably destroyed friend Sansone's credibility for Walsh (Walsh Dep. pp. 81, 438-9).

Plaintiff's credibility was no better. His "alibi" meeting with Griesedieck and Joe Sansone turned out to be no alibi at all (as defendants ascertained when Salerno was sent to St. Louis to check with Griesedieck—see doc. 34)! It was then learned by Life that plaintiff's meeting with Griesedieck was concluded by 10:30 a.m.—thus the mayor's "alibi" appears to be a phony, since the reception at the Sansone house following the burial was held later in the day. Yet, that "alibi" was offered right up to publication of the article (plaintiff's exhibit 1-C p. 6). That hurt plaintiff's credibility, to say the least (Walsh Dep. pp. 56-7, 81-7, 90, 261-3; App. pp. 28-9, 41-6, 48, 132-4).

4. The Rite Way meetings

The two Rite Way meetings were unambiguously established by FBI reports, fully verified by Department of Justice contacts, and in part admitted by Sansome and plaintiff. What more does one need?

We repeat. *There is not one whisper of a fact to show knowledge of falsity or serious doubts as to truth.*

APPENDIX D

Extracts from 36 documents of those relied on by Walsh concerning pertinent portions of Article.

12/13/57 [doc. 1] Letter Shenker to Secretary of State—incorporates Rite Way.

3/23/61 [doc. 2] Letter St. Louis Police Department to U. S. Attorney General—gives information regarding James Anthony Michaels, Sr.—"leader of the old Cuckoo Gang"—"reputed to be the most feared gunman here in the Twenties"—"respected and feared by the Underworld"—"has out of town connections with the hoodlum elements"—"has been arrested approximately 65 times since 1924 on charges of Murder, Armed Robbery, Gambling and other charges, but has only one conviction"—in prison 1934-1949 on armed robbery conviction.

4/11/61 [doc. 3] Janice Pikey notes regarding renewal application for insurance broker's license by Michaels—instructs that copies of license be sent to "A. J. Cervantes, Cobb, Walsh."

4/20/62 [doc. 4] Janice Pikey notes regarding letter insurance division to Cervantes, Cobb, Walsh—reports Michaels' application—"this applicant has stated he has brokered business through your agency in the past twelve months."

8/22/62 [doc. 5] Extract from I. R. S. report—reports interview Sansone "regarding his dealings with his father-in-law"—"On August 22, 1962, Sansone advised by telephone that he would refuse to answer our questions because it would be embarrassing to him because of his close relationship to Michaels, Sr."

9/ 5/62 [doc. 6] Extract from F. B. I. report—lists those for whom Michaels had written insurance including Anthony Sansone and Joseph Sansone—notes report in Post Dispatch that Michaels' license revoked—quotes Post-Dispatch that "Michaels was licensed as an insurance broker May 12, 1960, and listed four agencies with which he intended to do business, "including Cervantes, Cobb, Walsh.

2/15/63 [doc. 7] Extract from F. B. I. report—notes that Anthony Giardano has paid income tax assessment with money borrowed from Lindell Trust Company—"the loan is secured by a savings account passbook of James Holland, President of Mound City Tobacco Company, St. Louis, supplier of cigarettes to Anthony Novelty Vending Company."

9/13/63 [doc. 8] Extract from F. B. I. report—reports interview with Sansone—"He advised he has been instrumental in selling homes in that subdivision to his father-in-law, Michaels, Sr."

8/31/64 [doc. 9] Extract from F. B. I. report—notes conversation with Sansone from which informant "had gained the impression that Sansone was scared of some of the deals in which he was 'fronting' for subject" [Michaels].

12/4/64 [doc. 10] Extract from F. B. I. report—reports one hour meeting at Michaels' office of "an individual believed to be" Cervantes with Sansone and Michaels.

12/ /64 [doc. 11] Undated handwritten memorandum by Walsh—"Dec. 1964. Was Cervantes. Talked about mayoralty campaign."

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3/26/65 [doc. 12] Extract from F. B. I. report—details St. Louis police memorandum reporting meeting Rite Way of Giardano, Michaels and Sansone —"the portion of the conversation which was overheard by Detective Sergeant Ed Schaaf all pertained to the coming local election."

5/18/66 [doc. 13] Extract from F. B. I. report—reports grand opening of restaurant attended by Cervantes, Sansone and Michaels.

5/27/66 [doc. 14] Extract from F. B. I. report—reports interview with restaurant proprietor who advised that Sansone brought Giardano and Michaels to his restaurant to eat dinner.

8/26/66 [doc. 15] Extract from F. B. I. report—Dorothy Michaels, wife of James Michaels, "continues to collect rents from apartments" owned by Michaels but held in name of Sansone Realty Company, owned and operated by Sansone.

9/19/66 [doc. 16] Extract from unidentified report—reports meeting of Sansone and Giardano.

2/20/67 [doc. 17] Globe-Democrat article—headline "Cosa Nostra Groups in St. Louis, Other Cities, Form Core of Organized Crime, U. S. Study Says"—"A presidential crime commission has reported that the 'core of organized crime' consists of 24 La Cosa Nostra groups operating as criminal cartels in large cities across the nation. The commission was given evidence showing that the cities include St. Louis and Kansas City, The Globe-Democrat learned."

3/2/67 [doc. 18] Globe-Democrat article by Walsh—quotes "top U. S. Justice Department crime fighter,"

Henry E. Peterson, as stating that Michaels was an "ally by treaty" with the syndicate.

6/9/67 [doc. 19] Extract from F. B. I. report—reports funeral of Dorothy Michaels attended by Giardano.

6/9/67 [doc. 20] Extract from F. B. I. report—details attendance at Dorothy Michaels funeral—details attendance after funeral at Sansone residence—"At this get-together Mayor Cervantes was in attendance and acted as bartender serving drinks."

6/9/67 [doc. 21] Extract from F. B. I. report—"all of the hoodlums in the St. Louis area attended the funeral of Dorothy Michaels."

9/1/67 [doc. 22] Extract from Life article—identifies Giardano and Civella as leaders in Missouri of two of 24 Cosa Nostra families throughout the country [this was the article checked for accuracy by the board of experts in *Cerrito* v. *Time, Inc.*, 302 F. Supp. 1071 (N. D. Cal. 1969)].

9/7/67 [doc. 23] Extract from F. B. I. report—"the Frontier Hotel in Las Vegas is owned by the 'Outfit' and this is a place where members of the 'Outfit' now stop when arriving in Las Vegas."

1967 [doc. 24] Undated handwritten memorandum by Walsh—"Sansone borrowed $25,000 from Frank Cusumano as part of the purchase money for $150,000 worth of Vegas Frontier, Inc. debenture bonds in 1967."

1967 [doc. 25] Extract from undated memorandum—"On a Justice Department map of crime syndicate activities, St. Louis is pegged as one of the major syndicate centers in the midwest."

1/17/68 [doc. 26] Globe-Democrat article—"the Mayor said, in answer to a reporter's question at a city hall press conference, that he has never heard of any organized crime here." This pronouncement came in the face of one made the day before in St. Louis by U. S. Attorney General Ramsey Clark that the men of La Cosa Nostra ply their trade here. Again Thursday evening on a prerecorded television interview, Mr. Clark placed the mob in St. Louis and noted it leaned toward legitimate enterprises here, undermining the economic fabric of the community—"Mr. Vinson feels another obstacle in the path of law enforcement's drive against organized crime is much of the public's refusal to face the fact of La Cosa Nostra."

4/26/68 [doc. 27] Extract from F. B. I. report—"Anthony Sansone recently took sixty plus persons to dinner at Saro's restaurant"—"among those present" was Giardano.

9/5/68 [doc. 28] Michaels present at wake of Sansone's father "as were practically all of the Syrian and Italian hoodlum element in St. Louis."

10/10/69 [doc. 29] Cervantes press release—discusses reasons for formation of Commission on Crime and Law Enforcement—no mention of organized crime.

11/2/69 [doc. 30] Post-Dispatch clipping—announces appointment of Shenker as Chairman of the subsystem.

12/2/69 [doc. 31] Globe-Democrat clipping—"The Justice Department will establish a strike force of federal lawyers and investigators in St. Louis next spring as part of the government's expanding war on organized crime."

1970 [doc. 32] Undated handwritten memorandum by Walsh—"at Timmy Michaels wake greeted by Jimmy who introduced him around."

1/18/70 [doc. 33] Post-Dispatch clippings—announce appointment of Shenker as head of St. Louis Commission on Crime and Law Enforcement.

2/12/70 [doc. 34] Handwritten notes by Walsh—"Salerno 2/12/70—Joe G. said his two appointment records (one portable and one in his office) reflects a 9:30 a.m. on the day in question at City Hall. The meeting, on a tax matter, was attended by five people and lasted no more than hour. Those present were Joe G., the Mayor, Joe S. and 2 of Joe G.'s people. (Check clips on funeral)."

3/6/70 [doc. 35] Post-Dispatch clipping—reports complaints regarding high rent being paid by Federal Government at 210 North Twelfth Boulevard —quotes Government spokesman, "the very idea that we must move into the new building at higher rent is abhorrent, particularly in view of the fact that politicians are connected with the company that owns it."—refers to fact that two

of the associates owning building are Shenker and Murphy—"Both are lawyers and business associates of Mayor Alfonso J. Cervantes and both are influential in Democratic politics."—Murphy "is the Mayor's personal attorney."

4/3/70 [doc. 36] Globe-Democrat clipping—"U.S. Gathering Forces to War Against Organized Crime Here"—quotes government spokesman, "We have intelligence and background on organized crime which began concentration in this area 10 years ago."

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-727

ALFONSO J. CERVANTES,
Petitioner,

vs.

TIME, INC., and DENNY WALSH,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITIONER'S REPLY BRIEF

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TIME, INC., and DENNY WALSH,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITIONER'S REPLY BRIEF

Respondents' opposing brief in No. 72-727 contends that "Contrary to plaintiff's argument (Pet. pp. 16-21), the decisions below do not hold that newsmen have a First Amendment privilege to withhold the identity of their sources." (Res. Br. p. 11). We disagree.

If the decisions below did not create a nontestimonial privilege, then petitioner was denied the discovery provided for by the Rules and such plain error would require summary reversal.

In the courts below, respondents' insistence that the First Amendment conferred upon Walsh a privilege to

withhold the identity of his sources was the major stumbling block from the beginning of this suit. In the District Court petitioner promptly sought to compel disclosure of Walsh's claimed sources. In his appeal he asserted it was error to deny him this discovery. He has strenuously contended, at every step of the way, that given the names of the supposed Government employees, he could produce additional evidence of malice. As the Court of Appeals noted, petitioner's contention was not frivolous (Pet. p. A-9).[1]

This civil suit is governed by the Federal Rules of Civil Procedure. Rule 26(b)(1) provides that "Parties may obtain discovery regarding any matter, *not privileged*, which is relevant to the subject matter involved in the pending action . . ." (Italics supplied).

Accordingly, if the decisions below did not turn petitioner out of Court based upon a sustention of respondents' claim of a First Amendment privilege, then his complaint has been dismissed without affording him the discovery that must be given, as a matter of right, to every party in a civil suit. Aside from questions of due process and equal protection of laws that may arise, this patent violation of the Rules would constitute such plain error as to call for summary reversal.

The same is true of respondents' circuitous contention that the facts make it unnecessary to pass on the constitutional question of privilege. In effect, respondents say: We have made a showing of a good faith belief in the truth of the complained-of libels; hence, it is quite all right

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[1] Indeed, suppose from their depositions it is discovered that Walsh's alleged Government sources told him that it was an *un*reliable informer who reported that petitioner was bartender for mobsters, or, that other reports showed that petitioner was not at the Sansone home. Nothing short of Walsh's confession of knowledge of falsity could conceivably be more relevant to the issue of malice.

if petitioner is denied the right to controvert it through discovery because we divine that what he would discover will be irrelevant; and, since this case is governed by **New York Times** and its progeny, we qualify for the constitutional protection of summary judgment.

Respondents' Question No. 1 points out additional reasons that call for review of the decisions below.

Respondents contend that the Question presented by this case is whether they were entitled to summary judgment based upon their showing of lack of malice (Res. Br. p. 2, Ques. No. 1). Of course, built into the Question, as respondents pose it, is the erroneous assumption that it was proper to deprive petitioner of the discovery that might lead to evidence of malice. Aside from that, petitioner will demonstrate that the entry of summary judgment, based even upon the deprived record, is in harsh conflict with settled principles of defamation law and the Rules governing summary judgment.

Summary judgment should have been denied because the defamatory insurance story was published with malice.

To support the libel that Michaels and petitioner had a lucrative insurance business relationship, respondents rely upon their "documents 3, 4 and 6" (Res. Br. at top of p. 6). These documents are nothing more than Pikey's notes of the official record of Michaels' 1962 license renewal application and the Stegeman-Heckman letter. Petitioner contends that they did not justify publication of this libel. Assuming, arguendo, that these public records may have been ambiguous, the holding in **Time, Inc. v. Pape**, 401 U.S. 279 (1971), might be said to control if their interpretation was the only question involved. But there is far more that respondents understandably choose to ignore.

The material concerning this defamation has been capsuled in the Petition, pp. 5-7, and need not be repeated. Respondents learned that the insurance story was false from the very public officials who were charged with the responsibility of knowing the meaning of the records of the Department of Insurance of which they were the heads.[2] *Both men told Pikey that those records showed that Michaels had not brokered insurance through Cervantes.* Notwithstanding this knowledge of falsity, and lacking any basis whatsoever to do so, respondents willfully aggravated this libel by informing their readers that this nonexistent business tie was a lucrative one for petitioner.

We submit that the insurance story meets the malice requirement of **New York Times**, particularly if viewed in the light most favorable to petitioner, as it must be. **Adickes v. Kress**, 398 U.S. 144 (1970). **Vandenburg v. Newsweek, Inc.**, 441 F.2d 378 (5th Cir. 1971).

Summary judgment should have been denied because the defamatory bartender story was published with malice.

What has been said in the Petition, pp. 7-9, concerning the part of the article that made petitioner into a bartender for the elite of the underworld is not disputed and need not be repeated. The hard fact is that this defamation was based upon one report from an unknown informer—nothing more. When that is set against the volume of countervailing facts known by Walsh before publication, it must surely have created substantial doubt.[3] No wonder

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[2] Mr. Stegeman was head of the Brokers Division of the Department of Insurance. He wrote the letter that Mr. Heckman answered. Mr. Clay was head of the entire Division of Insurance. It was by virtue of his decision that Michaels' renewal application was denied.

[3] During his deposition, when Walsh was cornered by these facts, he claimed that he called his "people" in the Justice Depart-

he held these things back from what respondents call their "editorial process". We submit that the bartender story was published with a reckless disregard for the truth, to say the least; and, under constitutionally required instructions, a jury should be permitted to find that it was published with malice.

With respect to the remaining two libels, proof that Walsh maliciously fabricated will be produced when petitioner learns the identity of his claimed Government sources, who all too conveniently allegedly spoke to the guts of those libels whenever a purloined report was silent.

The courts below failed to recognize that when an article contains a libelous statement, it makes no difference if the bulk of the article was true.

The courts below did not follow settled principles of libel law which make it clear that a false matter is nonetheless libelous for having appeared in the same article with truthful statements. Afro-American Publishing Co. v. Jaffe, 366 F.2d 649, 655 (C.A. D.C., En Banc, 1966); and it is no defense to an action for defamation to prove some other or different kind of misconduct. Restatement, Torts, § 582, Comment (e).

Instead of applying these established principles, the courts below accepted respondents' invitation to focus upon the article as a whole in order to determine whether the paragraphs of which petitioner complained were

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ment, three years after the informer made his report, and they told him he was reliable. Significantly, three years before, when the St. Louis Globe-Democrat newspaper rejected the same story from Walsh because of serious doubts as to its truth, he did not call his "people" then. Remarkably, respondents have continued their silence concerning this. Of course, if they were to mention it, they would logically be required to justify the denial of petitioner's right to controvert it through the discovery provided in the Rules.

published with malice. Respondents successfully convinced those courts that the care and time spent in gathering and reviewing the material upon which the entire article was published supported their belief in its truth; and the 4 paragraphs of which petitioner complained were only a relatively minor and unimportant part of that vast enterprise which resulted in an article of 87 paragraphs; and, in addition, since petitioner complained of but 4 paragraphs, he either admitted or failed to deny the truth of the other 83. Indeed, as respondents state, the District Court actually said: "the four paragraphs complained of here have little or no impact on the total article. In context, the four paragraphs are a minute and relatively ineffective portion of the article as a whole" (Pet. p. A-23). As respondents correctly point out, the Court of Appeals adopted a similar view in affirming the action of the District Court (Pet. pp. A-7, A-8).[4]

Petitioner unsuccessfully urged the courts below that respondents' malice should be determined from their knowledge of falsity or reckless disregard with respect

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[4] The Court of Appeals stated: "Yet in the face of this massive attack . . . the mayor takes issue with but 4 of the 87 paragraphs comprising the article. So far as the vast amount of the other material is concerned, its truth is either admitted or not explicitly denied. Thus, we are concerned here with *only the comparatively few words* said by the mayor to be false and defamatory . . ." (Pet. pp. A-7, A-8) (Italics supplied).

. . . . . .

". . . it was over a period of many months that Life's reporter carefully collected and documented the data on the basis of which *the article* was written and published. . . . Life's key personnel . . . spent countless hours corroborating and evaluating *this data*. Once suit was instituted, the mayor was provided with *hundreds of documents utilized in preparation of the article*" (Pet. pp. A-13, A-14) (Italics supplied).

The paragraph concerning the insurance story is based upon two documents which petitioner produced. The bartender story and the other two defamations are based upon one document each, not hundreds of documents.

to each of the 4 defamations complained of with the judicial inquiry focused upon the malice stemming from each libel, undiluted and uninfluenced by a belief that malice may be absent with respect to the rest of the article.

For the convenience of the Court, we have annexed hereto, as Appendix A, some excerpts from petitioner's brief filed in the Court of Appeals. The authorities cited there show that the courts below labored under the misconception that the other 83 paragraphs constituted a defense to the 4 paragraphs complained about.

Respondents' "*corroboration* theory" does not cancel their malice in publishing the insurance and bartender stories.

Respondents' "*corroboration* theory" played a major role in beguiling the courts below to write off the insurance and bartender stories.

The theory begins with the specious claim that since petitioner complained of but 4 paragraphs, he admitted, or failed to deny, the other 83. Significantly, both of the courts below thought that to be of such import as to require its recitation in their opinions. As we have already mentioned, it exemplifies that erroneous concepts of libel law were applied since those 83 paragraphs, even if true, would not excuse the libels complained about. By actual count, 54 of those paragraphs concerned Mr. Shenker exclusively and the rest dealt with matters that were just as disconnected from the insurance and bartender stories. How can they possibly be said to corroborate them?[5]

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[5] The 4 complained-of libels are the only ones wherein petitioner was alleged to have a business and personal tie with the underworld through consortium with a known and recognized criminal (Michaels).

Moreover, when and where was petitioner supposed to deny them in filing a "short and plain statement of the claim" pursuant to Rule 8(a)(2) Fed.R.Civ.Pr. Respondents have arrogated to their article the qualities of a pleading that needs to be answered paragraph by paragraph.

The corroboration theory is also propped up by respondents' expertise in the technique of guilt by accusation. Most of what was said about Sansone, organized crime in St. Louis and the St. Louis Crime Commission was utterly ridiculous and would be shown to be such at a full-blown trial. Those matters find no place in the procedure for resisting summary judgment based solely on malice and their injection into the case, at that stage, would have involved the Court in an impossible trial by paper.

Another facet of the corroboration theory is respondents' expertise in the technique of guilt by association. Admittedly, Sansone is the son-in-law of Michaels. According to respondents, Michaels' reputation was transferred to Sansone and from him it went to petitioner; and Shenker's guilt by accusation became petitioner's guilt by appointment.[6]

Lastly, respondents point to their "editorial process" as the corroborator of the 4 relevant libels. This process

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[6] This is what petitioner knew about Mr. Shenker when he appointed him Chairman of the St. Louis Crime Commission:

> He had served on the Board of Directors of a host of Jewish, Catholic and Protestant charities too numerous to mention. In 1964, he received the Human Relations Award of St. Louis University. He was the recipient of the Distinguished Alumnae Award of Washington University in 1967 and the Award of Honor by the Lawyers Association of St. Louis in 1966. He had been a delegate to four national Democratic conventions; had served as President of the National Association of Defense Lawyers; and was a member of the Council of Criminal Law Section of the American Bar Association.

was nothing more than a perfunctory sham. It was concerned exclusively with the choice of words—the rhetoric of the article and nothing else. No one checked, corroborated or verified the "facts" as related by Walsh. They were accepted without question during the process of selecting the words that would be used to put them into print.

For convenience, we have annexed hereto, as Appendix B, excerpts from petitioner's brief filed in the Court of Appeals, citing references to the Appendix showing beyond doubt that the editorial process neither investigated, verified, or corroborated the complained-of defamations or even a single sentence of the entire eight-page article.

"Investigative report" versus "hot news"

Respondents slough off the second question presented by the Petition as a negligence argument that would penalize a publisher for investigating. According to respondents, if "plaintiff doubts that Life conducted such an investigation, then it is this 'falsehood' on which Life should be challenged" (Res. Br. p. 9 and note at p. 9). Respondents have missed the point. Petitioner's second question goes to the propriety of endowing the publisher of a self-proclaimed investigative report with the same latitude for inaccuracy that is given to the publisher of "hot news".

Of course, no publisher should be penalized for investigating. The question, however, is whether some responsibility should attach when a publisher proclaims in his defamatory article that he has done so. In this case, Life voluntarily trumpeted at every turn that it had conducted a year-long investigation. Thus, Life took it upon itself to maximize its credibility. We suggest that holding Life to its word is not precluded by the First Amendment.

CONCLUSION

The answer to the Question posed in respondents' opposing brief shows the presence of a factual issue of malice and summary judgment should have been denied. In granting summary judgment, the decisions below proceeded upon a misconception of libel law that so seriously wrenches settled principles as to require review by this Court. Moreover, the showing of a factual issue of malice met the very conditions set out in the Opinion for overriding the newsman's privilege it erected, and disclosure of sources should have been ordered. If the denial to petitioner of the right to discovery was not done pursuant to a newsman's privilege, then plain error was committed calling for summary reversal.

Therefore, for the reasons stated both in the Petition and this Reply, review is warranted by this Court.

Respectfully submitted

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December 18, 1972.

Certificate of Service

I hereby certify that on this 18th day of December, 1972, three copies of Petitioner's Reply Brief were delivered to Mr. Robert S. Allen, c/o Lewis, Rice, Tucker, Allen and Chubb, Counsel for Respondent Time, Inc., 611 Olive Street, St. Louis, Missouri 63101; and to Mr. D. Jeff Lance, Counsel for Respondent Denny Walsh, 611 Olive Street, St. Louis, Missouri 63101. I further certify that all parties required to be served have been served.

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APPENDIX A

I

The Opinion Erroneously Required Plaintiff to Prove the Entire Article Was Published With Malice When He Needed to Show a Factual Issue of Malice Only With Respect to Any One of the Pleaded Libels.

In general, when specific words within an article are claimed to be defamatory, courts will look to the entire publication to find the meaning of those words in the context in which they were used. However, once it is determined that the complained-of words were defamatory, then the judicial inquiry is focused upon the publisher's good faith belief in their truth to determine whether those words were published with malice. This is so because if any part of an article is defamatory, it would make no difference if all the rest was published with exemplary care and was true.

In this case, it is conceded that the 4 defamations of which the Mayor complains each constitute a libel per se if published with malice. Accordingly, only the defendants' knowledge of the truth or falsity of each defamatory statement is relevant here.

However, the Opinion found an absence of malice by mistakenly addressing itself to the article as a whole, as though it was to be viewed in its entirety, in order to decide if there was malice with respect to the 4 defamations complained of.

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We respectfully suggest that the Opinion would have cast this case in a vastly more accurate light if it had recognized that 4 separate libels were complained of; and then examined each for malice, separate and apart from the rest of the article.

The authorities are in unanimous accord that when an article contains a libelous statement it makes no difference if the bulk of the article was true or prepared with meticulous care. In short, even if the other 83 paragraphs were true, and even if the most exacting standards of investigation and corroboration were used in their preparation, that still would not constitute a defense, nor would it increase plaintiff's burden one iota with respect to any of the 4 libels complained of. What was stated more than half a century ago in **Meriwether v. Publishers: George Knapp & Co.**, 97 S.W. 257, 269 (Mo. 1906), is representative of the present day black letter rule:

> "In a publication, if a number of truths should be stated about a named individual which would be libelous if untrue, and in the same article a false and slanderous statement about the person should appear, we cannot see upon what ground he could be denied the right to recover on account of the publication of the false and slanderous matter. The false matter would be nonetheless libelous for having appeared in the same article with the truthful statements."

See, also, **Restatement of Torts**, § 582, Comment (e), declaring that it is no defense to an action for defamation "to prove some other substantially different kind of misconduct even though it is equally or more reprehensible. Thus, a charge of burglary against one is not justified by proof that he has committed a murder."

In Hanson, Libel and Related Torts, Vol. 1, § 99 at page 82, it is stated:

> "Nor can specific charges be defended by showing either a different misdeed or general disrepute." (Citing cases).

If the rule were otherwise "then a publisher of a newspaper may publish a libel of whom he will, and escape

liability by appending a modicum of truth to the article." **Meriwether**, *supra*, at p. 269. For a recent holding to the same effect, see **Afro-American Publishing Co. v. Jaffe**, 366 F.2d 649, 655 (CA D.C. Cir., En Banc, 1966), where it is stated:

> "The article contained other items that were true, but in the setting already described these only reenforced the defamatory impression. Partial truths are not necessarily even mitigating in this branch of the law, for the defamer may be the more successful when he baits the hook with truth."

. . . . . .

Plaintiff must respectfully insist that a different result will be reached when the defendants' malice is examined within the perimeter of their knowledge of falsity with respect to each of the 4 defamations. That is to say, the Opinion should have focused upon the malice stemming out of each of those libels, undiluted and uninfluenced by the belief that there was an absence of malice with respect to the other 83 paragraphs.

APPENDIX B

Paragraph 31 of the article (repeated in the press release) charges plaintiff with acting as bartender for the royalty of the underworld. Here is how the editorial process functioned respecting that libel:

Mr. Flaherty testified: He did not know the story was based on an informer's report (A. 290); or that the Mayor denied being there (A. 291); or that Sansone denied that the Mayor was there (A. 292); or that the Globe-Democrat had refused to publish the same story (A. 292-293); or that the same informer's report put Mr. Stanley Musial there and Mr. Musial denied it (A. 293). He did not know that Life had Ralph Salerno check and he verified that the Mayor was in his office that morning (A. 295-296).

Mr. Harry Johnston, a lawyer for Time, Inc., who screened the article with the law of defamation in mind, testified: He did not know that the Globe-Democrat had refused to publish the same story (A. 347), or that both the Mayor and Sansone vehemently denied that the Mayor was there (A. 348), or that the same report also placed Mr. Musial at this get-together and he denied his presence (Johnston Depo. p. 93). But Mr. Johnston would not stultify himself. **He also testified that, if he had known these things he would have had doubt as to the truth of paragraph 31** (A. 360). *But Walsh knew them.*

Mr. Sackett did not know that Walsh had never talked to anyone who claimed to have seen the Mayor at the get-together (A. 429). Moreover, he did not cause the article to be checked for accuracy, stating: "I am an editor. I am not a reporter" (A. 437).

Turning to the "editorial process" in connection with the publication of paragraph 27 wherein it is alleged that

Michaels brokered insurance for the Cervantes firm, **Managing Editor Graves admitted that if he had known that Michaels' application for renewal of his broker's license did not state that he had brokered insurance with the** Cervantes firm, **he would not have approved paragraph 27** (A. 254, 258). *But Walsh knew it and Pikey knew it* and lawyer Johnston knew it when he was shown a copy of the applications (A. 318-319).

Mr. Flaherty testified that he relied on Walsh (A. 253) and, if he had known the truth about Michaels' applications for renewal of his broker's license, **he would not have approved paragraph 27** (A. 253-254).

Remarkably, neither Flaherty, Sackett nor Johnston knew of the Stegeman-Heckman correspondence until **after** the article was published (A. 254-255, 455, 326-328). But attorney Johnston, as we would expect a lawyer to be, was honest enough to admit that the Stegeman-Heckman correspondence indicated to him that Michaels had **not** written insurance with Cervantes and, had he known of it, **he would not have approved paragraph 27** (A. 334-335). *But Walsh and Pikey knew all about the correspondence.* In fact, Pikey had been told in no uncertain terms by both Mr. Stegeman and Mr. Clay that the Stegeman-Heckman exchange meant that Michaels had **not** brokered insurance with Cervantes.

Counsel for the defendants have stipulated that Mr. Levitt did not have any more knowledge than Mr. Flaherty; and that Mr. Perle, another of Life's lawyers, did not have any more knowledge than lawyer Harry Johnston. For that reason, their depositions were not taken (A. 411-415).